IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 101

CITY OF CHICAGO, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees

No. 102

CITY OF CHICAGO, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

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DOCKET ENTRIES
("Georgian train")

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF CHICAGO, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, VILLAGE OF MILFORD, CITY OF WATSEKA, CITY OF HOOPESTON, CITY OF DANVILLE, CITY OF TERRE HAUTE, CITY OF VINCENNES and MAURICE F. RADRIZZI,

Plaintiffs,

v.

No. 68 C 956

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,

Defendants.

LIST OF DOCUMENTS

Placita, January 8, 1969 Session

DATE 1968	PROCEEDINGS
5/27	Filed complaint and 7 copies with Appendix's 1 through 7 attached thereto.
5/27	Filed Designation
5/27	Filed Affidavit under Rule 29
5/27	Filed Plaintiff's Motion and Memorandum in support of motion for separate trials in the action with exhibits "A" and "B" attached thereto, and 3 copies.
5/27	Issued summons and 4 copies with 4 copies of complaint as to United States of America and Interstate Commerce Commission

5/27–Issued summons and one copy with one copy of complaint as to Chicago and Eastern Illinois Railroad Company. EOE

6/13–Filed summons returned served on Chicago & Eastern Ill. Railroad. $3.00 v

6/13–Filed summons returned served on U.S. and Interstate Commerce Com. $6.00 v

6/21–Filed appearance of attorneys for defendant Chicago & Eastern Illinois Railroad Co. and 2 affidavits re Rule 39. v

7/1–Filed Affidavit under Rule 39 by James H. Durkin, attorney for defendant Chicago and Eastern Illinois Railroad Company.

7/1–Filed Affidavit under Rule 39 by Patrick C. Muller, attorney for defendant, Chicago and Eastern Illinois Railroad Company.

7/1–Filed Affidavit under Rule 39 by Keith F. Bode, attorney for defendant, Chicago and Eastern Illinois Railroad Company.

7/1–Filed Affidavit under Rule 39 by David C. Roston, attorney for defendant, Chicago and Eastern Illinois Railroad Company. R

7/1–Filed Notice.

7/1–Filed motion of defendant Chicago and Eastern Illinois Railroad Co., to dismiss

7/1–Entered Order motion to dismiss complaint by defendant Chicago and Eastern Illinois Railroad Co., taken under advisement. Briefs: 15-10 & 5. Perry, J. Mailed notice 7/3/68

7/1–Filed motion for leave to intervene by National Association of Railroad Passengers

7/1–Filed motion for leave to intervene by Georgia Public Service Commission and Tennessee Public Service Commission

7/1–Filed plaintiffs' motion for summary judgment

7/1–Filed memorandum in support of motion for summary judgment in plaintiffs' favor

7/1–Filed petition for reconsideration before the Interstate Commerce Commission, Finance Docket No. 24725

7/1–Filed reply of Chicago & Eastern Illinois Railroad Company to petition for reconsideration, before the Interstate Commerce Commission, F.D. No. 24725. G

7/1–(1) Motion of National Association of Railroad Passengers for leave to intervene (2) motion of Georgia Public Service Commission and Tennessee Public Service Commission for leave to intervene (3) motion for summary judgment, all taken under advisement: briefs instanter 15 & 10. Plaintiffs given 15 days to file additional motions with brief in support. Defendants to file answering brief 10 days thereafter and plaintiffs given 5 days thereafter to file their reply brief. Mailed notice 7/3/68. Perry, J. G

7/12–Filed Notice.

7/12–Filed Motion for extension of time.

7/12–Enter order motion for extension of time, parties to file brief by July 23, 1968; answering briefs July 31, 1968; reply briefs August 5, 1968, Perry, J. Mailed Notices 7/16/68. v

7/15–Filed Three-Judge Court Designation consisting of the following Judges: Honorable Elmer J. Schnackenberg, Honorable Edwin A. Robson, and Honorable Joseph Sam Perry. EOB

7/23–Filed memorandum of Chicago & Eastern Illinois Railroad Company in support of its motion to dismiss the complaint or in the alternative to strike certain allegations of the complaint

7/23–Filed proof of service. G

7/26–Filed motion of Alabama Public Service Commission and city of Evansville for leave to intervene and com-

plaint of intervening plaintiffs Alabama Public Service Commission and city of Evansville (Indiana) (3 copies). G

7/26–Filed supplemental memorandum in support of plaintiffs' motion for separate trials and for summary judgment (3 copies). G

7/31–Filed plaintiffs' answering memorandum in opposition to C&EI's motion to dismiss plaintiffs' complaint (3 copies). G

8/1–Filed joint memorandum of the United States of America and the Interstate Commerce Commission. G

7/29–Filed joint answer of the United States of America and the Interstate Commerce Commission. G

8/2–Filed notice and defendant Chicago and Eastern Illinois Railroad Company's motion to file memorandum

8/2–Filed memorandum of Chicago and Eastern Illinois Railroad Company in opposition to plaintiffs' motion for summary judgment and in support of the motion to strike paragraphs VII(B)(2) through VII(B)(10)

8/2–Filed proof of service.

8/2–Filed affidavit of John T. Warren (3 copies of all documents). G

8/2–Leave to file instanter memorandum in opposition to plaintiffs' motion for summary judgment granted. Leave given to remaining parties to file brief on or before August 10, 1968. Perry, J. Mailed notice 8/5/68. G

8/6–Filed reply memorandum of Chicago & Eastern Illinois Railroad Company in support of its motion to dismiss the complaint or, in the alternative, to strike certain allegations of the complaint

8/6–Filed proof of service (3 copies). G

8/7–Filed plaintiffs' reply memorandum on motion for summary judgment (3 copies).

8/7–Filed defendants notice of filing objections to motion to consolidate and Objections of Chicago & Eastern Illinois

Railroad Company to the motion to consolidate case No. 68 C 1666 with 68 C 956. (4 cys.) To Judges

9/11--Filed Exhibits by Gordon P. MacDougall. v

7/1–Filed amended designation of Three Judge District Court, due to death of Circuit Judge Elmer J. Schnackenberg, designating Hon. Win G. Knoch, Senior United States Circuit Judge, Hon. Edwin A. Robson, United States District Judge and Hon. Joseph Sam Perry, United States District Judge

10/4–Filed Motion of Indiana Public Service Commission and City of Henderson for Leave to Intervene and 3 copies. G

10/4–ORDERED cause set down for hearing at 10:30 A.M. on Monday, November 4, 1968. Perry, J. Mld. Notices 10-8-68. EOB

10/31–Filed Affidavit of J. B. Bonebrake and 3 copies. EOB

11/1–Filed Motion of Kentucky Railroad Commission and Mississippi Public Service Commission for leave to Intervene, and 3 copies. EOB

11/4–Hearing: held and cause taken under advisement, Knoch, J., Perry, J. and Robson, J. Mailed Notices 11/5/68

11/4–Order motion of defendant Chicago and Eastern Illinois motion to dismiss granted and cause hereby is dismissed. Knoch, Perry & Robson, J. Mailed notice 1/9/69. (Draft) JS6 G

1969

3/6–Filed plaintiffs' notice of appeal to the Supreme Court of the United States. $5.00p

4/9–Filed ICC transcript No. 24725 (under separate certificate)

4/9–Enter Order Motion to deliver up ICC transcript, docket No. 24725 to United States Supreme Court, granted. Perry, J. Mld. Notices 4-10-69. EOB

DOCKET ENTRIES
("Hummingbird" train)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TENNESSEE PUBLIC SERVICE COMMISSION, CITY OF CHICAGO, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, STATE OF LOUISIANA, ALABAMA PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSION OF OHIO, RAILWAY LABOR EXECUTIVES' ASSOCIATION and UNITED TRANSPORT SERVICE EMPLOYEES (AFL-CIO),

Plaintiffs,

v. No. 68 C 1666

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Defendants.

DATE 1968	PROCEEDINGS
9/6	Filed complaint and 5 copies. JS5 $15.00
9/6	Filed designation
9/6	Filed motion for temporary restraining order and memorandum in support of temporary restraining order and 3 copies
9/6	Filed motion for consolidation and 3 copies
9/9	Issued summons and 5 copies with 5 copies of complaint

9/6–Enter Temporary Restraining Order. (Draft) Order motion for temporary injunction and motion for consolidation with 68 C 956, City of Chicago, et al. v. United States of America, et al., entered and set for hearing before Judge Perry on September 12, 1968 at 10:15 a.m. Robson, J.

9/12–Filed appearance of Louisville and Nashville Railroad Company as defendant and that of their attorneys

9/12–Filed affidavit re general rule 39

9/12–Filed answer of Louisville and Nashville Railroad Company, defendant

9/12–Filed motion to dissolve the restraining order, or, in the alternative to require plaintiffs to post adequate bond

9/12–Filed motion of Louisville and Nashville Railroad Company, defendant, to dismiss the complaint

9/12–Filed memorandum in opposition to the motion for consolidation

9/12–Filed memorandum in opposition to motion for preliminary injunction (3 copies of documents listed above) G

9/12–Filed memorandum in support of temporary injunction or continuance of temporary restraining order

9/12–Filed amended complaint

9/12–Evidence heard and arguments concluded. Order alternative motion of defendant Louisville and Nashville Railroad Company to dissolve restraining order or to require plaintiffs post bond denied. Motion of plaintiffs for extension of temporary restraining order entered September 6, 1968, granted and said order to remain in effect until further order of Court. Motion Louisville and Nashville Railroad Company to dismiss complaint and motion of plaintiffs for consolidation of this proceeding with cause 68 C 956 are taken under advisement. Order plaintiffs given 6 days to file an answer to defendants brief this day filed and defendants are given 6 days to file reply thereto.

Cause continued under advisement under Rule 13. (Draft) Mailed notice 9/17/68. Perry, J. G

9/18–Filed plaintiffs' answering memorandum. G

9/25–Filed designation of Three Judge Court, Hon. Win G. Knoch, Senior United States Circuit Judge, Hon. Edwin A. Robson, United States District Judge and Hon. Joseph Sam Perry, United States District Judge. G

9/25–Filed summons returned served as to United States. $3.00

9/25–Filed summons returned served as to Louisville and Nashville RR Co. $3.00

9/25–Filed Marshal's return on service of summons and complaint served as to Interstate Commerce Commission. $4.00 G

9/26–Filed Memorandum of Louisville and Nashville Railroad Co. in response to plaintiffs' answering Memorandum. v

10/3–Filed Statement of Position of the United States of America and the Interstate Commerce Commission. C.

10/4–ORDERED cause set down for hearing at 10:30 A.M. on Monday, November 4, 1968. Perry, J. Mld. Notices 10-8-68. EOB

10/7–Filed Statement of Position of the United States of America and the Interstate Commerce Commission. EOB

10/10–Filed plaintiffs' Motion for Leave to file Supplemental Memorandum, Affidavit of Gordon P. MacDougall and Supplemental Memorandum on Venue. C

10/22–Filed Amended Answer of Louisville and Nashville Railraod Company, defendant, and 3 copies. EOB

11/1–Filed Motion of Kentucky Railroad Commission and Mississippi Public Service Commission for leave to intervene, and 3 copies. EOB

11/4–Filed Joint Answer of the United States of America and the Interstate Commerce Commission. EOB

11/4–Hearing held and cause taken under advisement, Knoch, J., Perry, J. and Robson, J. Mailed Notices 11/5/68

1/6–Filed Letter to Judges from Attorneys for Louisville & Nashville Railroad Co. with copy of order from I.C.C. dated Nov. 4, 1968. P

1/6–Filed Summary Memorandum of Louisville and Nashville Railroad Co. P

1/8–Order motion of Louisville and Nashville Railroad Company to dismiss granted and cause dismissed. Further ordered that temporary restraining order heretofore entered is hereby dissolved. (Draft) Mailed notice 1/9/69. Knoch, Perry & Robson. JS6 G

1/9–Motion for stay of court order of 1/8/69 dissolving temporary restraining order in entitled cause, Order the court entertains this motion and has been informed that Judge Robson is in Washington, D.C. on a multiple litigation hearing, and the court has also been informed that Judge Knoch is also not available; therefore, as one of the three Judges, the motion is denied for want of jurisdiction of one of the three Judges to stay the execution of a three judge court order. Mailed notice 1/10/69. Perry, J. G

3/6–Filed plaintiffs' notice of appeal to the Supreme Court of the United States. $5.00 pd

4/9–Filed ICC transcript No. 25047 (under separate certificate)

4/9–Enter Order Motion to deliver up ICC transcript Docket No. 25047 to United States Supreme Court, granted. Perry, J. Mld. Notices 4-10-69. EOB

A true copy attest
Elbert A. Wagner, Jr., Clerk

By: /s/ McClendon Grice
Deputy Clerk, U.S. District Court
Northern District of Illinois

Date: April 25, 1969

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 68 C 956

CITY OF CHICAGO, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, VILLAGE OF MILFORD, CITY OF WATSEKA, CITY OF HOOPESTON, CITY OF DANVILLE, CITY OF TERRE HAUTE, CITY OF VINCENNES and MAURICE F. RADRIZZI, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, *Defendants*.

Memorandum and Order

Before Knoch, Senior Circuit Judge, and Robson and Perry, District Judges.

Robson, District Judge:

This is a suit to review certain findings and conclusions of the Interstate Commerce Commission. The defendant railroad has moved to dismiss. This court is of the opinion that the motion should be granted.

On August 31, 1967, the Chicago & Eastern Illinois Railroad Company ("Eastern") gave notice under 49 U.S.C. § 13a(1) that, effective October 1, 1967, its trains numbered 93 and 54 between Chicago, Illinois, and Evansville, Indiana, would be discontinued. On September 18, 1967, the Interstate Commerce Commission ("Commission") entered an order requiring Eastern to continue operating trains 93 and 54 pending an investigation by the Commission. After hearings and briefs, Division 3 of the Commission on January 25, 1968 (served January 31, 1968),

decided to terminate its investigation, and filed a report outlining its reasons. A petition for reconsideration was denied on May 8, 1968. This suit was filed shortly thereafter. A three-judge court was convened and a joint hearing (with *Tennessee Public Service Comm.* v. *United States*, 68 C 1666) was held on November 4, 1968.

The statute under which Eastern posted its notices to discontinuance is a unique statute passed in 1958 to deal with serious financial problems faced by this nation's railroads. It allows the railroads to discontinue certain interstate trains without seeking prior approval of the Interstate Commerce Commission or any state commissions. If the Commission does nothing to stop the railroad, the discontinuance follows automatically by statute, with no need whatsoever for a Commission order to authorize the discontinuance. 49 U.S.C. § 13a(1). The Commission has a short period (30 days) in which to decide whether an investigation is necessary, and, after an investigation (if, of course, the Commission determines it is necessary), the Commission may order the continuance of part or all of the trains involved. This period of continuance is restricted to only one year, after which time the railroad may post further notices and go through the entire process again.

It has been conceded by both sides that when the Commission decides not to enter into an investigation, there is no judicial review, even though there may be cities and states which might be "aggrieved" by the discontinuances. *State of New Jersey* v. *United States*, 168 F.Supp. 324 (D. N.J. 1958), *affirmed per curiam* 359 U.S. 27 (1959); *Sludden* v. *United States*, 211 F. Supp. 150 (M.D.Pa. 1962). In the *New Jersey* case, *supra*, at 329, the court said that the Commission's order foreclosing an investigation was

> "nothing other than an announcement that the Commission intended to take no action with respect to the railroad's notice of intention to discontinue the ferries. Section 13a(1) clearly leaves to the absolute discretion of the Commission the determination of whether or not

> it . . . shall make any investigation of the matter or avail itself of its temporary veto power by way of suspension within the limitations of the Act."

The instant case, contend the plaintiffs, has a crucially different element: The Commission here entered into an investigation, held hearings, made findings, and issued an order terminating the investigation. Even though the plaintiffs concede, as they must, that the statute [§ 13a(1)] was the source for the authority to discontinue, and not any order or action of the Commission, they argue that judicial review exists as to the order terminating the investigation under 28 U.S.C. § 1336, which provides for review of Commission "orders". The question whether such a Commission order does fall under § 1336 has been discussed at length in several prior decisions.

In *State of Minnesota* v. *United States,* 238 F.Supp. 107, 112 (D.Minn. 1965), the Court determined that the report and findings filed after the investigation was terminated were both "gratuitous" acts. The reasoning behind the Commission's decision to terminate, the court continued, even though it showed that the Commission "decided" that the discontinuances were proper, is part of the power to terminate and within the "sole discretion" of the Commission, and not subject to judicial review. The court reasoned that the primary purpose of an investigation and the hearings was to give the Commission enough information so that it would be able to reach a sound judgment as to whether it should interfere with the proposed cutbacks in rail service. Two situations were posed: (1) Where the Commission knows enough about the situation, as in the *New Jersey* case, *supra,* at 328, it will hold no investigation, and the discontinuance will occur automatically; and (2) Where the Commission does not know enough about the problem, it will investigate, hold hearings, determine (as in this case) that the discontinuance does not warrant its interference, terminate the investigation, and the discontinuance will *still* occur automatically. There is, said the

court, no logical difference between the two situations. Where the Commission decided to take action, the order requiring continuance for one year would be reviewable; however, the "mere decision of the Commission to take no action is not". *Minnesota, supra,* at 112. To provide review of decisions to terminate investigations, concluded the court, would not only be contrary to the clear meaning of § 13a(1), but would be poor policy, "since it might even encourage the Commission not to investigate doubtful cases." *Id.,* at 113.

The court in *State of New Hampshire* v. *Boston and Maine Corp.,* 251 F.Supp. 421 (D.N.H. 1965), recognized that there might be some unfairness here. However, it said that Congress, in meeting what was almost a crisis situation, could provide review for one side (the railroads), especially where the other side would be seeking review of Commission "non-action", if there were cogent policy considerations to call for such a result. *Id.,* at 425. It is entirely within the spirit of the legislation to have given the railroads rapid relief without lengthy review. In fact, it was the delay inherent in the proceedings before the state commissions that called forth the passage of Section 13a(1). See the discussion of the legislative history in, e.g., *State of Vermont* v. *Boston and Maine Corp.,* 269 F.Supp. 80, 84 (D. Vt. 1967).

These considerations sufficiently meet, in this court's opinion, the contention by two later courts that Congress did not intend to deny judicial review in the present circumstances. *Vermont, supra; City of Williamsport* v. *United States,* 273 F.Supp. 899, 902-903 (M.D.Pa. 1967).*

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*The same underlying facts were the substance of the case of *City of Williamsport* v. *United States,* 282 F. Supp. 46 (M.D. Pa. 1968), affirmed *per curiam* 392 U.S. 642 (1968). This case decided that the Commission has the power to order a partial continuance of operations, but did not discuss the jurisdictional question at all. There was also no discussion of the jurisdictional issue in *People of the State of California* v. *United States,* 258 F. Supp. 950 (N.D. Cal. 1966).

Further supporting this conclusion is the fact that in Section 13a(2), which deals with wholly intrastate operations, Commission approval is expressly necessary before a railroad can discontinue any service. 49 U.S.C. § 13a(2). The provisions, therefore, in 28 U.S.C. § 1336, that only Commission "orders" are reviewable, call for judicial review in cases falling under Section 13a(2). But where, as in Section 13a(1), the statute is self-implementing, no comparable "order" of the Commission is involved. Taking the statute in its entirety, it seems apparent that Congress intended to deny judicial review in the instant case.**

** The Commission takes the position that review is proper under the present statute but has requested an amendment to the Act to remove any doubt. *Vermont, supra,* at 83-84, n. 2.

This court, in view of its opinion on the jurisdictional issues, does not pass on the other questions presented.

It is therefore ordered that the defendant Chicago & Eastern Illinois' motion to dismiss be, and it is hereby granted and the cause is hereby dismissed.

WIN G. KNOCH
Circuit Judge

J. SAM PERRY
District Judge

EDWIN A. ROBSON
District Judge

January 8, 1969.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 68 C 1666

TENNESSEE PUBLIC SERVICE COMMISSION, CITY OF CHICAGO, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, STATE OF LOUISIANA, ALABAMA PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSION OF OHIO, RAILWAY LABOR EXECUTIVES' ASSOCIATION AND UNITED TRANSPORT SERVICE EMPLOYEES (AFL-CIO), *Plaintiffs*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Defendants*.

Memorandum and Order on Motion to Dismiss

Before Knoch, Senior Circuit Judge, and Robson and Perry, District Judges.

Robson, District Judge:

This is a suit to review certain findings and conclusions of the Interstate Commerce Commission. The defendant railroad has moved to dismiss. This court is of the opinion that the motion should be granted.

On April 3, 1968, the Louisville & Nashville Railroad Company ("L & N") gave notice under 49 U.S.C. § 13a(1) that, effective May 7, 1968, its trains numbered 6 and 7 between Cincinnati, Ohio, and New Orleans, Louisiana, would be discontinued. The Interstate Commerce Commission ("Commission"), on April 24, 1968, entered an order requiring the L & N to continue operating trains 6 and 7

pending an investigation by the Commission. After hearings, the Commission terminated its investigation, and on September 3, 1968 (served September 6, 1968) filed a report. This action was filed shortly thereafter, and, on September 9, 1968, a temporary restraining order was entered. After a further hearing, the restraining order was continued until a three-judge court could be convened and a decision rendered. A joint hearing (with *City of Chicago* v. *United States*, 68 C 956) was held on November 4, 1968. The Commission denied a petition for reconsideration on October 31, 1968, thereby making its action administratively final.

The defendant L & N has moved to dismiss on the ground that this court lacks jurisdiction to review the Commission's decision to terminate the investigation of the proposed discontinuance. This issue was discussed at length in the opinion filed today in *City of Chicago* v. *United States*, 68 C 956. A copy of that opinion is attached and the argument on the jurisdictional issue is hereby incorporated by reference. In short, this court is of the opinion that Congress intended to deny judicial review in cases such as the one before this court.

It is therefore ordered that the defendant Louisville and Nashville Railroad Company's motion to dismiss be and it is hereby granted, and the cause is hereby dismissed.

It is further ordered that the temporary restraining order heretofore entered be and it is hereby dissolved.

WIN G. KNOCH
Circuit Judge

J. SAM PERRY
District Judge

EDWIN A. ROBSON
District Judge

January 8, 1969

ORDER

SERVICE DATE
SEPTEMBER 20, 1967

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 18th day of September A.D. 1967.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.
DISCONTINUANCE OF TRAINS NOS. 93 AND 54
BETWEEN CHICAGO, ILL., AND EVANSVILLE, IND.

It appearing, That on August 31, 1967, the Chicago & Eastern Illinois Railroad Co. filed with this Commission notices under section 13a(1) of the Interstate Commerce Act, as amended, that effective October 1, 1967, said carrier will discontinue service of its passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind.;

It further appearing, That complaints by certain individuals, associations, communities, and by railway employees have been received requesting suspension of the proposed discontinuance pending investigation to determine the extent of public need for the trains in question;

It further appearing, That discontinuance of the said train service by the Chicago & Eastern Illinois Railroad Co. may not be warranted by the public convenience and necessity, and that operation of such service may not unduly burden interstate commerce;

It further appearing, That the due and timely execution of this Commission's functions in this proceeding imperatively and unavoidably requires the omission of an examiner's recommended decision herein, for the reason that under the provisions of section 13a(1) of the Interstate Commerce Act, the said train service may be discontinued unless a decision herein is made before expiration of the four-month period hereinafter provided for;

It is ordered, That an investigation of the proposed discontinuance of train service described hereinabove, be, and it is hereby, instituted under the provisions of section 13a(1) of the Interstate Commerce Act, and that the matter be assigned for hearing at a time and place hereafter to be fixed;

It is further ordered, That the train service described hereinabove be continued pending hearing and decision in said investigation, but not for a longer period than four months beyond the date when the discontinuance otherwise would have become effective unless otherwise ordered herein; and

It is further ordered, That a recommended decision by the examiner to whom the investigation is assigned for hearing be omitted as part of the decision-making process in this proceeding, and the record herein shall be considered as certified to the Commission, Division 3, for initial decision when received by the Secretary of the Commission for filing in the docket.

By the Commission, Division 3.

/s/ H. Neil Garson
Secretary.

(SEAL)

Served January 31, 1968

F-9449

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—Discontinuance of Trains Nos. 93 and 54 Between Chicago, Ill., and Evansville, Ind.

Decided January 25, 1968.

Upon investigation, found that operation by the Chicago & Eastern Illinois Railroad Company of passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., is not required by public convenience and necessity, and that the continued operation thereof will unduly burden interstate commerce. Investigation discontinued.

James H. Durkin and *Edwin Richardson* for rail carrier.

J. Fred Parker for Georgia Public Service Commission, protestant.

William H. Wilson for Public Service Commission of Indiana, protestant.

Mary Louise Wolford for the public of the State of Indiana, protestant.

Edward G. Finnegan, Leon J. Heidgen and *James A. Parker* for Illinois Commerce Commission, protestant.

Harold Cowen and *Bernard Rane* for city of Chicago, Ill., protestant.

Robert S. Matthews and *Ronald Warrum* for city of Evansville, Ind., protestant.

Keith E. Roberts for village of Milford, Ill., and city of Watseka, protestants.

William E. Nelson for city of Hoopeston, Ill., protestant.

Marion E. Wright for city of Danville, Ill., protestant.

Robert F. Doolittle, Jr. for city of Vincennes, Ind., protestant.

Frederick T. Bauer for city of Terre Haute, Ind., protestant.

Raymond J. Kearns for Sisters of Providence, St. Mary of the Woods, Ind., protestant.

William P. Byroad, Gordon E. Cox, R. L. Dresbach, Thomas J. Duggan, George B. Lee, J. Thomas McNeal, William E. Nelson, Earl G. Quinn, Keith E. Roberts, J. H. Smith, and George P. Sheahan for various railway labor organizations.

Report of the Commission

Division 3, Commissioners Tuggle, Bush, and Stafford

TUGGLE, *Commissioner:*

Pursuant to the provisions of section 13a(1) of the Interstate Commerce Act as amended, the Chicago & Eastern Illinois Railroad Company (C&EI), a common carrier by railroad subject to the provisions of part I of the act, on August 31, 1967, filed notices and supporting statements in which it proposed to discontinue, effective October 1, 1967, service by its interstate passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., a distance of 287 miles. Copies of the notices were duly served and posted in the manner required by section 13a(1) and our rules and regulations thereunder.

By petition filed concurrently in Finance Docket No. 24726, C&EI seeks authority under section 13a(2) to discontinue service by its intrastate passenger trains Nos. 3 and 4 between Chicago and Danville, Ill. That proceeding is the subject of a report and recommended order[1] of the

[1] By petition filed December 14, 1967, C&EI sought omission of the examiner's report and recommended order in Finance Docket No. 24726 and consolidation of that matter with this proceeding. Replies thereto were filed by certain protestants, and by order entered January 8, 1968 the petition was denied.

hearing examiner served separately. C&EI's application filed with the Illinois Commerce Commission for authority to discontinue trains Nos. 3 and 4 was denied by that body on September 20, 1967. Appropriate notice of the petition filed here in Finance Docket No. 24726 was served on the Governor of the State of Illinois.

Protests to C&EI's proposal in the titled proceeding were filed by communities along the line and State, civic, business, and railway labor interests, as well as users of the trains. By order of September 18, 1967, we instituted an investigation and required continued operation of trains Nos. 93 and 54 pending a hearing and decision (up to the statutory maximum of 4 months). Because of the statutory limitation on the time available for investigation and decision, our order provided for omission in the titled proceeding of a report and recommended order by the examiner as part of the decisional process and for certification of the record to us for initial decision.

Public hearings were held in Chicago, Momence, Watseka, Hoopeston and Danville, Ill., and Evansville, Vincennes, and Terre Haute, Ind., on a consolidated record with the section 13a(2) proceeding in Finance Docket No. 24726. Briefs were filed by C&EI, the Illinois Commerce Commission, and jointly by the village of Milford, the cities of Watseka, Danville and Hoopeston, Ill., and the Brotherhood of Railroad Trainmen.

At the hearing protestants moved for dismissal of the proceedings on several grounds, principally that since Missouri Pacific Railroad Company (MoPac) controls C&EI, use of financial data relating only to C&EI and excluding MoPac is grossly misleading and contrary to the provisions of the act. Other relief sought included suspension or termination of the proceedings and oral argument on the motion. C&EI replied in opposition, and the motion was taken under advisement. The protestants pursue the argument on brief.

The motion is denied. Oral argument is not warranted. By contending MoPac is a necessary party to these proceedings, protestants ignore the plain language of section 13a of the act, which confers upon this Commission jurisdiction over proposed passenger train discontinuances by "a carrier or carriers subject to this chapter." Clearly, C&EI falls within the term "a carrier" subject to part I of the act. Whether or not the statutory standards for ordering a continuance of service are met is a matter which, in this case, does not depend (as will later be made clear) upon the corporate relationship of MoPac and C&EI. Piercing the corporate veil may be warranted in some situations, as for example, where false and misleading representations are made or where some unlawfulness may be involved, and perhaps in other circumstances, but here no such question is raised and no substantial reason is advanced to pursue that course. The record indicates that C&EI is the proper party in interest and that it has fully cooperated in presenting the data required for our action.

Trains Nos. 93 and 54 operate on the following schedules:

Train No. 93 daily	Miles	Stations	Train No. 54 daily
P.M.			A.M.
3:45	0.0	Lv. Chicago, Ill. .....Ar.	10:35
3:59	6.6	Chicago (63rd St.)	10:21
A4:30	28.8	Steger	E 9:44
....	77.5	Watseka	G 8:49
6:10	123.2	Danville	7:55
7:15	177.5	Terre Haute, Ind.	6:40
B7:45	203.7	Sullivan	G 6:11
8:18	234.7	Vincennes	5:40
D8:50	259.0	Princeton	5:05
9:55	287.2	Ar. Evansville .....Lv.	4:30

A—Stops to receive passengers.
B—Stops to discharge revenue passengers from Chicago and Steger.
D—Stops to discharge or receive revenue passengers.
E—Stops to discharge passengers.
G—Stops to receive revenue passengers for Chicago.

Their operation is in conjunction with trains of the Louisville & Nashville Railroad (L&N) similarly designated, which operate between Evansville and Atlanta, Ga., and Montgomery, Ala. The interchange is at Evansville. The L&N splits its southbound No. 93 at Nashville, Tenn., with one section terminating at Atlanta and the other at Montgomery. L&N originates one section of its northbound train No. 54 at Atlanta and the other at Montgomery, and consolidates the two at Nashville.

The trains, designated "The Georgia—Hummingbird," carry passengers and baggage. They are powered with three diesel locomotives, and have a consist of 10 regularly assigned cars daily with 11 cars on Friday, Saturday and Sunday. Train No. 93 leaves Chicago with a baggage-mail car, a dormitory, diner, lounge, sleeper and two coaches destined to Atlanta daily; a coach destined to Evansville on Friday, Saturday and Sunday; two coaches destined to Montgomery daily; and a sleeper destined to Mobile daily. Train No. 54 has a baggage-mail car, a dormitory, diner, lounge, sleeper and two coaches orignating at Atlanta daily; a coach originating at Evansville on Friday, Saturday and Sunday; two coaches originating at Montgomery daily; and a sleeper originating at Mobile daily; all cars having destination to Chicago. The passenger-carrying equipment is air-conditioned.

Due to a restructuring of mail service by the U. S. Post Office Department, the mail cars were discontinued as of June 10, 1967, except for one storage-mail car from Chicago to Birmingham, Ala., and in October 1967, the Post Office Department removed that car. The mail handled in the baggage-mail car is minimal. Train No. 93 still carries express traffic for the account of Railway Express Agency, Inc., destined to Chattanooga. These trains do not handle the express to or from C&EI points south of Chicago.

Alternate passenger transportation service to and from the communities served by C&EI between Chicago and

Evansville, and south thereof served by L&N is available by bus and by air at most points. There are four flights daily southbound and three northbound between Chicago and Danville; two flights daily southbound and three northbound between Chicago and Terre Haute; and four flights daily southbound and five northbound between Chicago and Evansville. Numerous flights are scheduled between Chicago, on the one hand, and, on the other, Atlanta, Chattanooga, Birmingham, Nashville, Montgomery, and Mobile, and between Evansville and Atlanta. Watseka and Hoopeston, Ill., Sullivan, Vincennes and Princeton, Ind., have no air service.

A major bus line operates three southbound and four northbound buses daily between Chicago and Evansville, with stops at all intermediate points served by the subject trains. Rail transportation is available, though limited, (a) by C&EI trains Nos. 3 and 4 between Chicago and Danville (but those are the trains involved in Finance Docket No. 24726, the discontinuance proceeding referred to above) and (b) by Illinois Central Railroad (IC) between Chicago and Carbondale, Ill., and points south thereof (four trains daily in each direction). Highway distances between communities served by C&EI and those served by IC in Illinois vary from 12 to 35 miles. Bus fares are lower than rail fares between Chicago and all points served by the subject trains, except Sullivan, Ind. Air fares are higher than rail or bus.

C&EI maintains that it has lost patronage to the private passenger automobile (as a mode of intercity transportation), and, as evidence thereof, introduced statistics showing the increase in the number of registered automobiles in the counties of Illinois and Indiana traversed by the subject trains. Considering the five Illinois counties (Cook, Will, Kankakee, Iroquois, and Vermillion) and the six Indiana counties (Park, Vigo, Sullivan, Knox, Gibson, and

Vanderburg) it was shown that in 1960 the Illinois counties had 1,653,520 registrations while the Indiana counties had 132,253, and that by 1966, there was an increase of about 20 percent—to 1,994,751 in the Illinois counties and 158,186 the Indiana counties.

For the benefit of automobile users, Illinois Highway 1 between Chicago and Danville and U. S. Highway 41 between Danville and Evansville are adjacent to and parallel the line of C&EI. Also U. S. Highway 41 continues northward in Indiana east of Illinois Highway 1 to Chicago. Both are first class highways and U. S. Highway 41 has substantial segments with four lanes. A number of witnesses testified to the effect that driving on the highways is dangerous. South of Chicago and its suburbs the roads traverse sparsely populated areas, are generally straight and the terrain is flat.

The population[2] at the points served by the subject trains was shown as follows: Chicago 3,550,404, Chicago Heights 41,000, Watseka 5,219, Hoopeston 6,606, Danville 41,856, Terre Haute 72,500, Sullivan 4,979, Vincennes 18,046, Princeton 7,906, and Evansville 141,543.

A number of those points have commercial or service areas extending beyond their corporate limits and the population reflected by such areas is larger than for the point involved.

During the periods 1965, 1966 and first 6 months of 1967, train No. 93 carried 84,259, 82,213 and 31,913 passengers, respectively, of which 53,344, 56,230, and 20,952 were delivered to L&N at Evansville. The daily average numbers of revenue passengers transported by that train for the same periods were 230,225, and 176, respectively, of which

[2] Based on the census taken in 1960. Since that time, some of the areas served have had population increases.

84, 71, and 60, respectively, were local passengers (traveling between C&EI stations). During the same periods, train No. 54 carried 76,854, 75,271, and 28,186 revenue passengers, respectively, of which 57,983, 60,063 and 21,682, were received from L&N at Evansville. The daily average numbers of revenue passengers transported by that train for the same periods were 210, 205, and 153, of which 51, 40, and 33, respectively, were local. The foregoing data were determined from analysis of records of tickets collected by conductors, cash fares received, and tickets honored but not collected, apportioned to the subject trains according to the number of miles traveled thereon.

The supporting studies also show the numbers of passengers boarding and deboarding at each station. Considering the last 6 months of 1967 as representing the present level of patronage, of the 176 passengers on train No. 93, an average of 156 boarded at Chicago, 12 at Steger, 5 at Danville, 2 at Terre Haute and 1 at Vincennes, and 17 left the train at Danville, 20 at Terre Haute, 1 at Sullivan, 7 at Vincennes, 2 at Princeton, 13 at Evansville, and 116 continued on the L&N. Of the 153 passengers on train No. 54 an average of 120 were through passengers from the L&N, 12 boarded at Evansville, 2 at Princeton, 6 at Vincennes, 1 at Sullivan, 11 at Terre Haute, 4 at Danville, and 1 at Watseka, and 3 left the train at Terre Haute, 3 at Danville, 8 at Steger and 139 at Chicago. Thus, the record shows that the C&EI points south of Chicago have had few passengers boarding or leaving the trains.

C&EI's balance sheet statement as of July 31, 1967, shows assets aggregating $119,182,901, including current assets of $10,220,039, special funds $484,841, investments $10,941,671, total properties less depreciation and amortization $96,182,478, and other assets and deferred charges $1,353,872. Liabilities were: current liabilities of $9,631,117, long-term debt of $53,494,944 (including $3,103,470

due within 1 year), reserves $659,983, other liabilities and deferred credits $619,844, capital stock $29,837,372, capital surplus $112,522, and retained income $24,827,119. Its income statements for 1965, 1966 and first 7 months of 1967, show railway operating revenues of $40,578,936, $41,780,952, and $23,604,275; net railway operating income of $3,486,070, $4,091,786, and a deficit of $1,005,900; and net income after fixed charges and other deductions of $1,736,086, $2,853,372, and a net deficit of $1,757,265, respectively.

C&EI has incurred annual net railway operating deficits in its passenger service in amounts in excess of $1 million for the years 1962 through 1966, inclusive. More than 20 percent of freight net income has been required to subsidize these rail passenger deficits in each of the years 1957 through 1966, except 1959 when the percent of freight net income so required exceeded 12 percent. C&EI estimates that the national award of September 16, 1967 to the shopcraft employees, retroactive to January 1, 1967, will increase its labor costs by $210,000 in 1967 and by $321,000 in 1968. Further, a recent agreement with the Brotherhood of Locomotive Engineers will result in payment of $100,000 to C&EI locomotive engineers in backpay. None of those additional expenses were included in determining the cost of operating the subject trains during the first 6 months of 1967, or in projections made.

C&EI shows data respecting the financial results of the operation of the trains for the years 1965, 1966, and the first 6 months of 1967. In 1965, train No. 93 had revenues (passenger, diner, express and mail) of $1,096,607 and out-of-pocket expenses of $1,001,950 for a net income of $94,657. For the same year, train No. 54 had similar revenues of $811,156, and out-of-pocket expenses of $862,270 for a net out-of-pocket loss of $51,114. In 1966, the corresponding figures for train No. 93 were $1,083,494 revenues, $1,125,287 costs, and $41,793 deficit; for train No. 54 they

were $816,863 revenues, $1,022,127 costs, and $205,264 deficit; the combined net loss for both trains was $247,037. In the first 6 months of 1967, the corresponding figures for train No. 93 were $420,167 revenues, $522,421 costs, and $102,254 deficit, and for train No. 54, $311,281 revenues, $477,387 costs, and $166,106 deficit; the combined net out-of-pocket loss was $268,360. Details of the revenues and expenses for those periods indicated as computed by the carrier are shown in the attached appendix A.

As indicated, actual revenues from these trains, including carbire revenue are reflected in the data presented. The following actual expenses were also employed: Train engineman expense, traincrew expense, sleeping car expense, insurance, expenses incurred in clearing wrecks, baggage loss and damage claims, injuries to persons and dining car and buffet car service. Other expenses and savings data were computed using methods approved by the Commission in prior proceedings. Increases in expenses for 1966 over those of 1965 occurred in four accounts (a) passenger train cars—repairs, (b) equipment depreciation—passenger cars, (c) train supplies and expenses, and (d) joint facility accounts. These were the subject of detailed inquiry. On (a) an accident to train No. 93 at Hoopeston in April 1966, were required extensive repairs to passenger cars ($59,506). Expenses charged to that account in 1965 were abnormally low. On (b) C&EI did not, until 1967, retire its head-end equipment used on other trains in 1965 and 1966, having made such equipment available to the U. S. Post Office Department for use in trains Nos. 93 and 54. Retirements of head-end equipment in 1967, when mail was removed from all C&EI passenger trains amounted to $365,549, but this increase in expense was not reflected in the financial results discussed above. In projecting revenues and expenses involved in operating the subject trains without the mail

revenue equipment, depreciation on only those cars which would be required to operate the subject trains without any head-end business was considered. On (c) the total passenger portion of the account actually decreased in 1966, but spreading the expense over fewer trains than in 1965, resulted in an increased allocation to the remaining trains. On (d) the increase in joint facility expenses in 1966 was due to the discontinuance of passenger trains by other railroads using such facilities, which added proportionally to the expense burden on the remaining trains.

Trains Nos. 93 and 54 use joint facilities at Chicago with four other railroads, and with one other at Terre Haute, Vincennes, and Evansville. During the first 6 months of 1967, no C&EI passenger trains, other than the subject trains used the Terre Haute, Vincennes and Evansville facilities, and as a result, all of the amounts paid for use of those facilities ($25,356, $18,136, and $104,328, respectively) are savable. Joint facility costs were computed in accordance with those methods and standards approved in *Chicago, R. I. & P. Co., Discontinuance of Trains*, 328 I.C.C. 278.

The foregoing data reflect revenues received by C&EI for transportation of mail. Projected annual revenues and out-of-pocket expenses, exclusive of mail traffic, using 1966 revenue data, show that C&EI would incur an annual loss of $242,850 in the operation of train No. 93 and $191,780 in the operation of train No. 54. In projecting equipment depreciation and other expense items only the equipment that actually would be used was considered. The projected annual revenues and out-of-pocket expenses, exclusive of mail traffic, were shown as follows:

	Train No. 93	Train No. 94
Revenues:		
102 Coach[1]	$532,953	$468,549
102 First class[1]	87,680	113,593
103-108 Baggage and other[1]	2,270	1,153
107 Express[2]	587	34,909
131 Dining and buffet[1]	47,844	47,844
Total revenue	671,334	666,048
505-538 Car-hire, net[3]	4,785	4,785
Revenue and income	676,119	670,833
Total expense	918,969	862,563
Profit or loss	(242,850)	(191,730)
Expenses:		
Maintenance of equipment—		
311 Repairs, diesel locomotives[4]	53,406	53,390
317 Passenger train car repairs[5]	141,817	141,817
331 Equipment depreciation—locomotive[6]	8,760	8,760
331 Equipment depreciation—cars[7]	30,103	30,103
335 Employee health and welfare benefits[8]	2,502	2,502
Traffic:		
351-360 Passenger traffic[4]	21,996	16,036
Transportation:		
373 Station employees[4]	15,650	14,568
376 Station supplies and expense[4]	3,062	2,768
378 Yard conductor and brakeman[9]	5,532	5,532
392 Train enginemen[10]	50,193	52,987
394 Train fuel[11]	30,400	30,400
397 Water for train locomotion[11]	1,781	1,781
398 Lubrication for train locomotion[11]	3,709	3,709
399 Other supplies for train locomotion[11]	168	168
400 Enginehouse expense—train[11]	8,108	8,108
401 Trainmen[10]	67,844	67,134
402 Train supplies and expenses[12]	88,308	88,308
403 Operating sleeping cars[4]	49,060	37,392
409 Employee health and welfare benefits[8]	5,163	5,222
Insurance[13]	16,405	16,405
419 Loss and damage—baggage[14]	550	480
420 Injuries to persons[14]	41,044	2,754
441 Dining and buffet service[4]	71,188	71,188

	Train No. 93	Train No. 54
Revenues:		
General:		
452 Clerks, accounting[4]	9,142	8,438
456 Employee health and welfare benefits[4]	360	324
All joint facility accounts[15]	170,720	170,720
532 Railway tax accruals[16]	21,958	21,542
Total expenses	918,969	862,563

[1] 1966 actual. The number preceding each item is the account number in the Commission's Uniform System of Accounts.
[2] Projected based on current traffic.
[3] Projected based on car assignments.
[4] Projected based on first 6 months 1967 expenses.
[5] Projected based on estimated car miles @ first 6 months 1967 cost per car mile.
[6] Based on two unit assignment.
[7] Based on cars required.
[8] Based on current G.M.A. rates applied to labor only.
[9] Based on current assignment.
[10] Based on 1966 payments plus wage increases.
[11] Based on 2 unit assignment @ first month 1967 cost per unit miles.
[12] Based on estimated car mile @ first 6 months 1967 cost per mile plus crews' lodging and meals at current costs.
[13] Based on current premiums.
[14] Based on 2.5 year average.
[15] Based on estimated car assignments.
[16] Based on current rates applied to labor only.

It is thus apparent that C&EI has incurred substantial losses in the operation of the trains Nos. 93 and 54 and that the losses will substantially increase as a result of the Post Office Department's removal of mail from those trains and the consequent discontinuance of passenger trains of other railroads using the Chicago terminal facility, although the latter factor was not considered in making the above projections.

Eight communities on the line served by the subject trains intervened in opposition: Chicago, Watseka, Mil-

ford, Hoopeston, and Danville, Ill., and Terre Haute, Vincennes, and Evansville, Ind. The trains do not serve Milford. Although some Illinois residents who ride C&EI train No. 4 northbound return on train No. 93 southbound, the witnesses testifying at communities in Illinois were primarily interested in the continued operation of trains Nos. 3 and 4. The latter are the subject of the section 13a(2) proceeding in Finance Docket No. 24726 and, under the provisions of that section, are being dealt with in the report of the hearing examiner. Indiana interveners and witnesses testifying at Indiana points were concerned with continued operation of the subject trains.

Of the 144 public witnesses who testified on the consolidated record, 90 directed their testimony in whole or in part to the subject trains. Not all use the services of the trains. Thirty-one testified on behalf of State, county, city government or municipal organizations, civic or trade organizations, and colleges or universities, and one presented the views of a Congressman. A number were concerned with rail passenger service generally, though they themselves did not use the services provided by the subject trains. With few exceptions the public witnesses desire the trains continued in what would be a standby service for use as convenience in bad weather, at holiday periods and for shopping trips. No public witnesses testified at Chicago.

At Watseka, the mayor and representatives of the chamber of commerce and the County Farm Bureau indicated that, although they do not use the subject trains, there is need for rail passenger service in inducing industry to locate in the area. A surgeon testified to using the trains 20-24 times a year to and from Chicago where, he indicates, an increasing number of his patients require medical service. He owns an automobile, but does not use it on long trips.

At Hoopeston, the mayor and the president of the chamber of commerce expressed concern over rail passenger service. Testimony was given by a department store buyer and a beautician. Two personnel managers of large corporations indicated that prospective employees inquire about transportation facilities to and from Chicago. One could express no opinion as to whether discontinuance of the subject trains would have a detrimental effect on recruiting employees in Hoopeston; the other uses other trains of C&EI and was more concerned with their retention. The president of the Hoopeston Industrial Corporation points out that every prospective industry mentions transportation. A representative of a corn festival held annually each September in Hoopeston urges continuation of the service, but of the 100,000 persons attending the last occasion, he knew of only four who came by rail. The foregoing witnesses themselves rarely patronize the subject trains. Another witness rides train No. 93 during unusually heavy snowstorms when other means of travel are not available.

At Danville, municipal, commercial and other organizational spokesmen were concerned with rail passenger service generally and specifically C&EI trains other than those here involved. Several other witnesses proved to be only occasional patrons of trains Nos. 93 and 54—a bookkeeper, a number of railroad employees (who rated their on-time performance as poor), a housewife (who finds them crowded and often late), another housewife whose children sometimes use the trains going to and from colleges (particularly in bad weather), and an architect who expressed the view that the discontinuance would hamper Danville's development. Another witness who uses C&EI trains about once a month, occasionally drives his automobile to Chicago, but would not go by bus because he considers the bus routes circuitous and the service time consuming. Support for continued operation was voiced by a junior chamber of commerce spokesman for 110 mem-

bers who testified that he used the trains only once, but that the majority of the membership use all C&EI trains; and by the chamber of commerce (representing 116 manufacturing firms) as part of its program to promote improvement in transportation. Several manufacturing organizations indicated that some of their employees occasionally use the trains. Spokesmen for three civic organizations use the trains several times a year, particularly during inclement weather, but also have used alternate transportation, including private automobile. A number of the witnesses testified that the northbound train is frequently late and dirty, that this was reported to the railroad and that there was little effective response.

At Evansville, the mayor and a State senator opined that discontinuance of the trains would be detrimental to the growth of industry and commerce in the community. The mayor uses air service on many occasions and uses rail service about once every 6 months. The senator does not have occasion to use C&EI's service. The chamber of commerce spokesman urged that the discontinuance be deferred until L&N acquires the eastern side of C&EI's line, although the transportation division which he represents voted six to three against opposing discontinuance. An aide to a member of Congress from Indiana presented the Congressman's views that rail passenger transportation service is vital to the economic growth of the community, and that all modes of transportation must be kept available. Other witnesses testified to a preference for rail over alternate modes for the occasional trips they take, though some of them found the rail cars crowded, dirty and sometimes unheated. Among them was the representative of a religious community having 30 nuns stationed at Evansville. She indicated that her order's recent transportation requirements were accomplished through use of charter bus service, and that the sisters have sufficient automobiles at their disposal.

At Vincennes, the mayor opposed the discontinuance but, in so doing, was not supported by the city council. The chamber of commerce mailed 475 questionnaires to area residents regarding the proposed discontinuance; 82 were returned showing a 3 to 1 preference for keeping the trains on. A survey at Vincennes University revealed that 22 of the 2,243 students use the trains. Members of the faculty use them twice a year. Seven students said they hope to use them more frequently, particularly during bad weather. A number of other witnesses—all of them only occasional users—complained about the condition of the trains and the station at Vincennes, about a poor on-time record, crowded and dirty equipment. All of the above witnesses urge continuation of the service with improvement of quality.

At Terre Haute, the mayor pressed the view that passenger train service is needed in the development of industry and commerce. On his six trips to Chicago in the past year he used train service once when his air flight was grounded on account of bad weather. The chamber of commerce cited statistics showing growth in population, commerce, enrollment in the universities and retail sales as yardsticks of a demand for improved service. Aware that loss of mail revenues has precipitated discontinuance of passenger rail service, it argued that the railroad should consider providing complete service, freight and passenger, and should look to the passenger market as any other business man looks at a new market. Further, that a successful company expects to absorb departmental losses within its gross earnings in order to provide a complete service. Professors and students of a local university, opposing the discontinuance, testified to their use of the trains variously from regular weekend use to once or twice a year during inclement weather. Student ownership of automobiles by upper classmen is permitted and some of the students use the trains only when they cannot

obtain automobile transportation. Student use of the trains is primarily on holidays and at the beginning and end of summer vacation. While enrollment at the local university has more than doubled in the past 6 or 7 years, use of the trains at Terre Haute has continued to decline.

A religious order with national headquarters at nearby St. Mary of the Woods has 350 members who ride the trains to Chicago twice annually for connections east and west thereof. The order has a number of automobiles at its disposal and has used them and bus service for Chicago trips. In advertising for its college the order would like to be in a position to advise prospective students that easy access is available via rail among other modes. It has had some difficulty with on-time performance of the trains, particularly in making connections. The college has about 400 students, a number of whom are from the Chicago area.

Some evidence was presented to show the carrier's car-cleaning program and the problems involved. Sometimes delay in arrival at Chicago requires quick turnaround, and cleaning of the cars leaves much to be desired. The record indicates that C&EI has made some effort to overcome the problem but must deal with C&WI which maintains the Chicago terminal facility.

Discussion and conclusions.—Numerous factors are considered in determining whether to order the continuance of service under section 13a(1) of the act. Among them are public use of the service, population of the area, effect of a train discontinuance upon the communities served, available alternate transportation, financial results of the operation, prospects for the future, and the carrier's financial condition. The weight to be given each factor depends on the circumstances in a particular case. No one factor is necessarily controlling. The intent of Congress in enacting section 13a was to enable carriers to discontinue train services that no longer pay their way, and for which

there is no longer sufficient public need to justify the financial loss involved. See *Southern Ry. Co.* v. *North Carolina*, 376 U.S. 93.

At one time the passenger train was the pride of the transportation system. This was especially so in the United States where there was vast wilderness to be tamed, rich deposits of natural resources to be tapped, and large, widely-separated cities to be connected. The railroad and its passenger trains provided the strands for tying the far-flung areas together, and the channels for rapid, efficient communication and transport. Time and inventive genius created more efficient means for performing a number of the functions for which we formerly relied on the rails. Electronics provide instant communication, and airplanes cut transport time tremendously for people, mail and express. The automobile and the supper highway—for which the American people have a special fascination—provide particular convenience which other modes cannot duplicate.

The evidence now before us shows that the subject trains no longer are used by express shippers (except for some movements between Chicago and Chattanooga), or by the Post Office Department for mail (once a highly remunerative source of traffic and a primary source of sustenance for passenger trains). Passenger traffic has been dwindling. In the meantime, costs continue upward inexorably. The general rise in costs throughout the economy are reflected in the railroad's expenses for employees, equipment, fuel, supplies, facilities and services. With the loss of mail revenues making a dramatice change in the financial results of the operation, C&EI would have to absorb an out-of-pocket deficit well over $400,000 per year in order to continue trains Nos. 93 and 54. It is likely that the deficit would go beyond a half million dollars.

Financially, this carrier is at best marginal. It has a history of deficit operation and is beset with numerous

problems flowing therefrom regarding rehabilitation of its line and recovery of traffic. See *Missouri Pac. R. Co. —Control—Chicago & E. I. R. Co.*, 327 I.C.C. 279 (1965). The slender profit shown on this record for 1965 and 1966 occurred at the height of a record breaking period of national prosperity. The relatively slight slowdown in the national economy during 1967 had an immediate and telling effect on C&EI's operation, creating a net deficit of nearly $2 million in the first 7 months of the year. C&EI is an important link in the national rail system and from the point of service in its own area and as an integral part of the national system, its viability is a thing much to be desired. Continuance of the subject trains would militate against that objective. There is no reasonable prospect for relief from the financial burdens imposed by those trains. To the contrary, all indications are that the burdens would mount. And this, in turn, would soon intensify the railroad's malaise, all to the detriment of the public.

The people who have been using the trains for travel have done so largely on an occasional or standby basis. Their primary means of conveyance are the automobile and other nonrail modes. The testimony of the governmental leaders, business representatives, students and housewives is clear proof of that. The witnesses themselves appear to prefer air and automobile travel. Many gave opinions about a need for rail passenger service in the interest of community and commercial growth, but few hard, realistic facts were advanced by them in support. The passenger use statistics stand as stark proof that, regardless of what is felt and said, the people along the C&EI's Evansville-Chicago line are not using the trains. Their patronage is minimal.

For those who must depend upon public transportation, bus service is far more plentiful than the train service—at all points on the line. Use of the buses will require

an adjustment, but whatever inconvenience might be experienced does not outweigh, on the scale of the public interest, the tremendous burden continued operation of the trains would involve. We conclude that discontinuance by C&EI of trains Nos. 93 and 54 is consistent with the purpose of section 13a(1) of the act, and the objectives of the national transportation policy.

Certain railway employees seek imposition of the *Burlington* or similar conditions in the event the discontinuance is authorized. Similar requests have been considered in prior proceedings of this nature, and the Commission has uniformly held that we do not possess authority to impose conditions for the protection of railway employees who may be adversely affected as a result of the discontinuance of passenger service under section 13a(1). See *Great Northern Ry. Co. Discontinuance of Service*, 307 I.C.C. 59. However, the probable effect of such discontinuance on employees is a matter to be considered in determining whether the public convenience and necessity require the continuance of such service. We have considered that factor, and, in our opinion, the probable adverse effect upon employees does not afford sufficient grounds to order continuance of the service.

Contentions of the parties as to fact or law not specifically discussed herein have nevertheless been considered and found to be without merit or material significance.

We find that the operation by the Chicago & Eastern Illinois Railroad Company of passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., is not required by the public convenience and necessity and that continued operation thereof would unduly burden interstate or foreign commerce.

An appropriate order will be entered discontinuing the investigation herein.

APPENDIX A

Statement of revenues and expenses for trains Nos. 93 and 94 in 1965, 1966 and 6 months of 1967

	1965		1966		Six Months 1967	
	Train No. 93	Train No. 94	Train No. 93	Train No. 94	Train No. 93	Train No. 94
Revenues:						
102 Coach (1)	$ 516,762	$ 480,139	$ 532,953	$ 468,549	$ 235,039	$ 197,355
102 First class (1)	90,033	172,097	87,480	113,593	33,631	49,172
103-108 Baggage & other (1)	1,606	493	2,270	1,153	2,970	1,315
106 Mail-RPO (1)	81,043	82,304	82,843	82,843	42,483	42,483
106 Mail-storage (1)	305,137	50,854	305,621	96,111	110,356	37,310
107 Express (1)	4,311	9066	2,955	4,762	7,258	6,436
131 Dining & buffet (1)	45,874	45,875	47,844	47,844	18,910	18,910
Total Revenue	1,044,783	782,988	1,062,966	825,855	426,167	353,581
505-538 Car hire, net (1)	31,842	48,488	21,328	2,008	(282)	(3,900)
Total Income (2)	1,076,807	831,196	1,083,670	819,987	426,167	351,781
Total Expense (See below)	1,001,950	862,270	1,125,787	1,022,127	527,621	477,387
PROFIT OR (LOSS)	74,857	(31,114)	(41,797)	(202,284)	(101,254)	(125,606)
Maintenance of Equipment:						
311 Repairs, diesel locomotives (3)	54,497	54,897	70,299	70,959	26,763	28,693
317 Passenger-train car-Repair (4)	89,300	72,511	174,853	163,022	75,937	70,866
331 Equip.Deprn.(52)Loco.(5)	12,996	12,996	12,996	12,996	6,498	6,498
331 Equip.Deprn.(56)Pass.Cars(6)	34,031	33,739	59,211	58,431	28,698	27,881
335 Emp. RRR benefits (7)	2,354	2,175	2,916	2,841	1,399	1,350
Traffic:						
351-360 Passenger Traffic (8)	17,896	15,539	19,959	16,914	10,998	8,818
Transportation:						
373 Station employees (9)	67,445	26,764	66,723	29,376	24,154	11,661
376 Sta. supplies & exp. (10)	2,568	2,568	2,568	2,568	1,531	1,386
378 Yard Cond. & Brkmn. (11)	1,436	1,436	1,661	1,661	1,832	1,832
392 Train enginemen (1)	48,649	31,393	47,803	50,369	23,674	24,517
394 Train Fuel (3)	58,187	58,616	46,150	44,583	18,607	18,401
397 Water for train Loco. (3)	1,506	1,517	2,486	2,510	1,078	1,078
398 Lube. for train Loco. (3)	2,746	2,766	3,127	3,156	2,245	2,245
399 Other supplies for train loco. (3)	648	654	377	380	101	101
400 Engine. expense train (3)	14,820	14,929	12,395	12,511	4,909	4,908
401 Trainmen (1)	61,163	61,861	64,651	63,937	29,278	29,201
402 Train supplies & exp. (12)	44,778	57,268	89,105	84,673	47,025	44,627
403 Operating sleeping cars (1)	44,199	44,585	41,171	31,561	24,530	18,896
409 Emp. RRR benefits (13)	7,727	6,136	8,394	5,908	2,490	2,448
insurance (1)	12,172	12,172	12,178	12,178	8,764	8,764
415 Clearing wrecks (1)	---	---	4,987	---	---	---
419 Loss & damage-baggage (1)	230	20	482	---	444	444
420 Injuries to persons (1)	78,330	2,375	22,782	2,593	11,000	1,667
441 Dining & buffet serv. (1)	69,161	69,161	78,839	78,839	35,594	35,594
General:						
452 Clerks, accounting (14)	13,566	13,566	10,972	10,292	4,571	4,139
456 Emp. RRR benefits (15)	580	576	629	604	180	162
All Joint Facility Accounts (16)	212,554	215,158	246,132	236,097	119,698	113,867
532 Ry. tax accruals (17)	24,350	20,196	29,631	25,281	10,992	10,622
TOTAL EXPENSES:	1,001,950	862,270	1,125,787	1,022,127	527,621	477,387

NOTES:

(1) Actual.
(2) Revenue plus car hire.
(3) Passenger portion of account divided by passenger unit-miles times unit-miles per train.
(4) Passenger portion of account divided by passenger car-miles exclusive of sleeping car-miles times actual car-miles per train.
(5) At I.C.C. rates distributed to trains on basis of units assigned.
(6) At I.C.C. rates distributed to trains on basis of actual car-miles.
(7) G.M.A. rates applied to labor portion of accounts Nos. 311 and 317.
(8) Distributed on basis of revenue pro rata.
(9) Includes mail handlers, also C&EI station employees.
(10) Trains Nos. 93 and 94's portion of Danville depot expense.
(11) Evansville border - actual.
(12) Passenger portion of account divided by passenger car-miles including sleeping car-miles.
(13) G.M.A. rates applied to labor portion of accounts Nos. 373, 378, 392 and 401.
(14) Revenue pro rata of actual wages.
(15) G.M.A. rates applied to labor portion of account No. 452.
(16) Savable portion of joint facility expense at Chicago, Terre Haute, Vincennes and Evansville.
(17) R.R. and U.I. rates (G.M.A.) applied to labor portion of accounts Nos. 311, 317, 351 through 360, 373, 378, 392, 401 and 452.

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 25th day of January 1968.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL. AND EVANSVILLE, IND.

Investigation of the matters and things involved in this proceeding having been made pursuant to the order of said division, dated September 18, 1967, a hearing having been held and the said division on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That this investigation be, and it is hereby discontinued, and that this order shall be effective 35 days from the date hereof.

By the Commission, division 3.

H. NEIL GARSON,
Secretary.

(SEAL)

Service Date
May 15, 1968

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 8th day of May, 1968.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL. AND EVANSVILLE, IND.

Upon consideration of the record in the above-titled proceedings, including the petition filed by the Cities of Chicago, Danville, Hoopeston, Terre Haute, Vincennes, and Watseka and the Village of Milford, on March 1, 1968, for reconsideration of the order of the Commission, Division 3, dated January 25, 1968, authorizing the above-titled discontinuance; applicant's reply thereto; petitioners' motion to strike certain matter appearing in the reply; and applicant's reply to the motion; and

It appearing, That the matters appearing in the reply to the petition objected to in the motion to strike are not of record in this proceeding and therefore not properly before this Commission as evidence and that no objection is made to the motion to strike;

It further appearing, That in order to invoke the jurisdiction of this Commission under section 13a(1) of the Interstate Commerce Act a carrier must comply with certain requirements, including the posting of notice "in each station, depot, or other facility involved" (49 CFR 43.5 (j)), which notice must contain a "complete description of the present service of the train . . . involved and of the discontinuance or change of operation or service pro-

posed" (49 CFR 43.5(c)); and that the purpose of requiring such notice is to give the travelling public affected the opportunity to protest the proposed discontinuance; and

It further appearing, That applicant in the above-titled proceeding failed to give the proper notice required, as described above, in that no notice was posted in those facilities along the through route of trains Nos. 93 and 54 south of Evansville, Ind., and the notice as posted contained no mention of the through-route nature of the trains south of Evansville; and that applicant therefore has not effectively invoked the jurisdiction of this Commission in the above-titled proceeding:

It is ordered, That the motion to strike certain matters appearing in applicant's reply to the petition for reconsideration be, and it is hereby, granted;

It is further ordered, That the petition, insofar as it seeks dismissal of the above-entitled proceeding for failure to invoke this Commission's jurisdiction under section 13a(1), be, and it is hereby, granted, and in all other respects is denied.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

Service Date
May 15, 1968

Corrected Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 8th day of May, 1968.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL. AND EVANSVILLE, IND.

Upon consideration of the record in the above-titled proceedings, including the petition filed by the Cities of Chicago, Danville, Hoopeston, Terre Haute, Vincennes, and Watseka and the Village of Milford, on March 1, 1968, for reconsideration of the order of the Commission, Division 3, dated January 25, 1968, authorizing the above-titled discontinuance; applicant's reply thereto; petitioners' motion to strike certain matter appearing in the reply; and applicant's reply to the motion; and

It appearing, That the order of the Commission, Division 3, acting as an Appellate Division, dated May 8, 1968, and served earlier on May 15, 1968, erroneously indicated that the Commission had granted the petition insofar as it sought dismissal of the above-titled proceeding for failure to properly invoke this Commission's jurisdiction under section 13a(1);

It further appearing, That the matters appearing in the reply to the petition objected to in the motion to strike are not of record in this proceeding and therefore not properly before this Commission as evidence and that no objection is made to the motion to strike;

It further appearing, That in order to invoke the jurisdiction of this Commission under section 13a(1) of the Interstate Commerce Act a carrier must comply with certain requirements, including the posting of notice "in each station, depot, or other facility involved" (49 CFR 43.5 (j)), which notice must contain a "complete description of the present service of the train . . . involved and of the discontinuance or change of operation or service proposed" (49 CFR 43.5(c)); and that the purpose of requiring such notice is to give the travelling public affected the opportunity to protest the proposed discontinuance;

It further appearing, That applicant in the above-titled proceeding gave the proper notice required, as described above; and

It further appearing, That no other new issues are raised or evidence of substance offered to support the request for reconsideration, and good cause has not been shown for granting the relief requested;

It is ordered, That the motion to strike certain matters appearing in applicant's reply to the petition for reconsideration be, and it is hereby, granted;

It is further ordered, That the petition for reconsideration be, and it is hereby, denied in all respects.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

SERVICE DATE
APRIL 26, 1968

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 24th day of April, 1968.

Finance Docket No. 25047

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
DISCONTINUANCE OF TRAINS NOS. 6 AND 7
BETWEEN NEW ORLEANS, LA., AND
CINCINNATI, OHIO

It appearing, That on April 3, 1968, the Louisville and Nashville Railroad Company filed with this Commission notices under section 13a(1) of the Interstate Commerce Act, as amended, that effective May 8, 1968 said carrier will discontinue service of its passenger trains Nos. 6 and 7 between New Orleans, La., and Cincinnati, Ohio;

It further appearing, That complaints by certain individuals, associations, state commissions, communities, and by railway employees have been received requesting suspension of the proposed discontinuance pending investigation to determine the extent of public need for the trains in question;

It further appearing, That discontinuance of the said trains service by the Louisville and Nashville Railroad Company may not be warranted by the public convenience and necessity, and that operation of such service may not unduly burden interstate commerce;

It further appearing, That the due and timely execution of this Commission's functions in this proceeding imperatively and unavoidably requires the omission of an examiner's recommended decision herein, for the reason that under the provisions of section 13a(1) of the Interstate Commerce Act, the said train service may be discontinued

unless a decision herein is made before expiration of the four-month period hereinafter provided for;

It is ordered, That an investigation of the proposed discontinuance of train service described hereinabove, be, and it is hereby, instituted under the provision of section 13a(1) of the Interstate Commerce Act, and that the matter be assigned for hearing at a time and place hereafter to be fixed;

It is further ordered, That the train service described hereinabove be continued pending hearing and decision in said investigation, but not for a longer period than four months beyond the date when the discontinuance otherwise would have become effective unless otherwise ordered herein; and

It is further ordered, That a recommended decision by the examiner to whom the investigation is assigned for hearing be omitted as part of the decision-making process in this proceeding, and the record herein shall be considered as certified to the Commission, Division 3, for initial decision when received by the Secretary of the Commission for filing in the docket.

By the Commission, Division 3.

/s/ H. Neil Garson
Secretary.

(SEAL)

Finance Docket No. 25047

Louisville and Nashville Railroad Company Discontinuance of Trains Nos. 6 and 7 Between New Orleans, La., and Cincinnati, Ohio

Decided September 3, 1968

Upon investigation, found that the continuance of operation by the Louisville and Nashville Railroad Company of its passenger trains Nos. 6 and 7 between New Orleans, La., and Cincinnati, Ohio, is not required by public convenience and necessity and that the continued operation thereof will burden interstate commerce. Investigation discontinued.

Clifford T. Coomes, Charles B. Arendall, Jr., Thomas S. Lawson, Jr., James E. Simpson, David M. Keeble, and *Robert T. McConaughy* for the Louisville and Nashville Railroad Company.

Weldon A. Cousins, Langdon D. Bell, Nat K. Knight, Bennett E. Smith, Robert A. Jones, Eugene W. Ward, James Kenneth Atkins, and *Chester L. Rigsby* for regulatory agencies of the States of Louisiana, Mississippi, Alabama, Tennessee, Kentucky, and Ohio, protestants.

Louis A. Schwartz, Lawrence F. Daspit, Horace Perry, William A. Thompson, Robert E. Kendrick, Rom McGrath, Raymond F. Simon, and *Bernard Rane* for protestants.

S. F. Walker, F. T. Edwards, Olin B. Brooks, Leslie Stifflemire, P. A. Young, Clifford H. Rex, Joe Hester, Henry E. Risner, John B. Mullins, Jr., J. W. Faust, J. G. Griffin, Alex E. Little, Harry T. Smith, W. R. Selby, A. L. Shepherd, and *Robert C. Tyler* for railway labor organizations, protestants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, BUSH, AND DEASON

TUGGLE, *Commissioner:*

Pursuant to the provisions of section 13a(1) of the Interstate Commerce Act, the Louisville and Nashville Railroad Company (L&N), a common carrier by railroad subject to the provisions of part I of the act, filed a notice and statement on April 3, 1968, in which it proposed to discontinue, effective May 7, 1968, the operation of its passenger trains Nos. 6 and 7 operating between New Orleans, La., and Cincinnati, Ohio, a distance of 927 miles. Copies of the notice were served and posted in the manner prescribed by section 13a(1) of the act and related rules and regulations.

Upon receipt of numerous petitions and letters of protest, an investigation of the proposed discontinuance of service was instituted by our order dated April 24, 1968, which required continued operation of the trains for a period not exceeding 4 months beyond the date when the discontinuance would have become effective. Because of the statutory limitaion upon the time available for investigation and decision, the order provided for the omission of a report and recommended order by the hearing examiner and for certification of the record to us for initial decision. Hearings were held at New Orleans, La., Mobile, Montgomery, and Birmingham, Ala., Nashville, Tenn., Louisville, Ky., and Cincinnati, Ohio. Briefs have been filed.

The trains.—Train No. 6 operates northbound daily from New Orleans to Cincinnati departing New Orleans 8:15 a.m. and arriving Cincinnati 8:10 a.m. the next morning. Train No. 7 operates southbound daily from Cincinnati departing Cincinnati 7:40 p.m. and arriving New Orleans 8:10 p.m. the next evening. The schedule of the trains, the points served, and their populations are set forth in appendix A.

Train consists and crews.—The regular consist of northbound train No. 6 is one double-unit diesel locomotive, one coach, one sleeping car, and one baggage-express car, New Orleans to Cincinnati, daily; one dining car, New Orleans to Nashville, daily; one dormitory car, Montgomery to Nashville, daily; one coach, Montgomery to Louisville, 3 days a week; from one to four express cars. Nashville to Cincinnati, 4 days a week; one storage-mail car, Louisville to Cincinnati, 4 days a week; and one mail-express car, Louisville to Cincinnati, 3 days a week.

The regular consist of southbound train No. 7 is one double-unit diesel locomotive, one coach, and one sleeping car, Cincinnati to New Orleans, daily; one or more express cars, Cincinnati to Louisville, at irregular intervals; one storage-mail car, Cincinnati to Nashville, daily; one baggage-mail car, Cincinnati to Montgomery, daily; one mail-express car, Louisville to Nashville, 6 days a week; one express car, Louisville to Nashville, 3 days a week; one coach, Louisville to Montgomery, 3 days a week; one dining car, Nashville to New Orleans, daily; one dormitory car, Nashville to Montgomery, daily; one storage-mail car, one baggage-mail car, and one coach, Montgomery to New Orleans, daily.

The equipment is described as modern and well maintained and the passenger cars are the newest owned by the carrier. The locomotive equipment would be retired and the car equipment transferred to other trains as replacements of older equipment.

Train No. 6 employes 6 engineers, 6 firemen, 5 conductors, 5 flagmen, 2 baggagemen, 2 coach attendants, 3 dining car employees, and a pullman porter for a total of 30 crew members. Train No. 7 employs the same number of employees in each of the same categories except 1 less conductor for a total of 29 crew members.

Other persons required for the operation of the trains include station and terminal employees who sell tickets,

operators and dispatchers charged with actual operation of the trains, yardcrews who form the trains and work on train equipment, car department employees who inspect, maintain, and clean the car equipment, and mechanial employees who maintain the required motor power.

One position in each pullman car would be eliminated; the personnel involved are not employees of the carrier.

Following the proposed discontinuance, the on-train crews would be employed in other services; they all maintain freight seniority and could be used in freight related positions. Those with insufficient seniority might be assigned to extra boards.

Use of passenger service.—In the respective periods of 1966, 1967, and 1968 (the last, annualized on the basis of data for February 1 to April 30, 1968), the passenger miles of the trains were 52,848,271, 48,668,491, and 22,035,336. In the respective periods of November and December 1967, January, February, March, and April 1968, the average number of passengers per train-mile on train No. 6 was 47, 82.6, 54.4, 30.4, 36.4, and 35.7. During the same periods the average number of passengers per train-mile on train No. 7 was 43.3, 85.4, 50.7, 30.9, 31, and 34.3.

Appendix B reflects the daily average "on" and "off" counts at all stations between New Orleans and Cincinnati for a 6-month period November 1, 1967 to April 30, 1968. The symbols (OC) and (L&N byd) refer to passengers transferring from other railroads and passengers transferring to other L&N trains. On train No. 6, the only intermediate points having an average of 8 or more passengers per day "on" or "off" were Pasagoula (10), Mobile (15), Montgomery (24), Birmingham (25), Decatur (8), Nashville (32), and Louisville (12). On train No. 7 the only intermediate points having a daily average of 7 or more were Louisville (20), Bowling Green (15), Nashville (30), Decatur (7), Birmingham (22), Montgomery (20), and Mobile (17).

Alternate transportation.—In addition to the trains proposed for discontinuance, L&N operates daily trains Nos. 8 and 9 (the Pan American) between New Orleans and Cincinnati, serving the same intermediate points, except Rigolets, La., a conditional stop on train No. 7. Train No. 8 departs New Orleans at 8:45 p.m., as compared with train No. 6's morning departure, and arrives Cincinnati at 9:30 p.m., the following evening. Train No. 9 departs Cincinnati 9:15 a.m., as compared with train No. 7's evening departure, and arrives New Orleans 7:55 a.m., the following morning. L&N also operates trains Nos. 15 and 16 (the South Wind) every other day, between Louisville and Montgomery, serving the same intermediate points as its other four trains. In connection with the Penn Central Railroad and the Seaboard Coast Line Railroad, the South Wind provides through service between Chicago, Ill., and certain Florida points, including Miami and St. Petersburg. Through service would remain between New Orleans and Atlanta, Ga., by change of schedule by the Atlanta and West Point Railroad (A&WP) between Atlanta and Montgomery, the latter an interchange point with the L&N, whereby A&WP would connect with L&N train No. 9 rather than with L&N No. 7 as at present.

All L&N stations here involved, except Rigolets, have direct daily bus service between New Orleans and Cincinnati. There are as many as 21 bus schedules between the various points, depending upon the populations.

Daily scheduled airline service is available between Cincinnati, Louisville, Bowling Green, Nashville, Birmingham, Montgomery, Mobile, Pascagoula, Gulfport, Biloxi, and New Orleans.

Official highway maps of the States involved herein indicate numerous combinations of Federal highways including several segments of the interstate system between New Orleans and Cincinnati and the principal intermediate points served by the trains.

Financial data.—The carrier's balance sheet as of March 31, 1968, shows assets of $1,003 million, including current assets of $97.4 million, special funds $4.3 million, investments $34.8 million, total properties less reserves for depreciation and amortization $857.3 million, and other assets and deferred charges $9.1 million. Liabilities were: Current $53.6 million; long-term debt, due within 1 year, $27.7 million; long-term debt, due after 1 year, $407.8 million; reserves $5.8 million; other liabilities and deferred credits $16.6 million; capital stock $123.9 million; capital surplus $22.1 million; and retained income unappropriated $345.4 million. L&N's income statements for the years 1966, 1967, and the first 3 months of 1968, show, respectively, railway operating revenues of $292.2 million, $285.3 million, and $73.5 million; net railway operating income $38.2 million, $31.4 million, and $6.6 million; net income after fixed charges and other deductions $28.5 million, $19.9 million, and $4.9 million.

The carrier's exhibits and testimony, as revised, depicting revenues, expenses, and out-of-pocket losses pertaining to the operation of the trains indicate net losses in 1966, 1967, and the first 4 months of 1968, of $9,318, $505,361, and $309,461, respectively. The estimated net loss for 1968, based on the month of April 1968, is $909,667. Net annual savings to the carrier, systemwise, upon discontinuance of the trains, are estimated to be $1,610,473. Appendix C reflects the actual revenues and expenses for the year 1967 and the first 4 months of 1968 in the first and second columns. The third column reflects the revenues and expenses for the year 1968 based upon the operating results for the month of April 1968. Column four reflects an estimate of the revenues that would be retained on other L&N trains and the added expenses of handling the traffic on other trains. Column five is an estimate of revenues that would be lost and the expenses to be saved by handling the traffic on other trains should the discontinuance of trains Nos. 6 and 7 be approved.

The revenues and costs, as set forth in appendix C, were computed by the carrier in accordance with generally accepted methods previously approved by the Commission as appropriate in train discontinuance cases and are not under dispute.

The operating expenses for 1966, 1967, the first 4 months of 1968, and the projection for the year 1968 were shown on an out-of-pocket basis. Wages of traincrews and enginecrews are the actual wages paid the crews, increased for the appropriate payroll taxes, meals, lodging, vacation, holiday, and health and welfare allowances. Locomotive fuel, water, lubricants and other supplies, locomotive depreciation, and personal injury and livestock damage, are on system averages with appropriate allocations to these trains according to the actual units involved. Dining expenses is the actual cost incurred and pullman deficits are the amounts billed by the Pullman Company.

Locomotive repairs and enginehouse expenses are based on system average unit costs applied to the number of units involved in these trains, decreased by 21 percent for overhead costs which include such items as labor costs and maintenance of facilities which would remain constant even though trains Nos. 6 and 7 were discontinued.

Car repairs and train supplies and expenses are similarly determined and subjected to a 21-percent decrease for overhead costs and elimination of the costs for deadhead cars on trains Nos. 6 and 7. Car depreciation and cost for rental of passenger cars were adjusted to eliminate deadhead equipment.

The joint terminal expenses shown to be avoidable as a result of the discontinuance were computed in the manner approved by the Commission in *Chicago, R. I. & P. R. Co. Discontinuance of Trains,* 328 I.C.C. 278, 286. They include only the amount by which the carrier's share of the total expenses would be diminished by virtue of its lesser use of

the terminals. The costs shown as savable do not include amounts attributable to deadhead equipment carried on trains Nos. 6 and 7 in and out of the terminals.

Evidence in opposition.—Thirty-nine public witnesses appeared at hearings in opposition to the discontinuance of the trains of whom 6 appeared at New Orleans, 9 at Montgomery, 16 at Birmingham, 6 at Nashville, and 2 at Louisville. No public witnesses appeared at Mobile or Cincinnati.

Among those expressing opposition were representatives of United States Congressmen, a representative of the Governor of Alabama, a State legislator, members and representatives of the Public Service Commission of Louisiana, Mississippi, Alabama, and Tennessee, a member of the Kentucky Railroad Commission, mayors, city and county officials, a representative of a college, a mortician, carrier employees, a pullman porter, and members of the public. Of the total witnesses, 14 were past and prospective patrons of the trains.

Public officials opposed the discontinuance of the trains on the stated ground that the economy and the industrial growth in the area is dependent upon continued service by all means of transportation, and particularly rail passenger service. They were also concerned with the general disapperance of passenger trains through discontinuances and the likelihood that all rail passenger service may become extinct. They, regular passengers, and others contend that alternate transportation services are not adequate.

Generally the passenger witnesses testified that at times there were equipment failures, that on time performances were poor, that overcrowding, particularly on weekends and holidays, had occurred, and that the employees were not as courteous as those of other common carriers. Criticism was also directed to a lack of advertising by the car-

rier. On the other hand, several of the patrons praised the carrier as being first class as compared with other railroads. All of such witnesses were desirous of having the trains for their future use and most preferred rail transportation to bus travel and some indicated their fear of air travel.

Discussion and Conclusions

Among factors to be considered in proceedings under section 13a(1) of the act to ascertain whether operation of the passenger trains is required for the public convenience and necessity and will not unduly burden interstate commerce are the population served, the effect on the communities on their route, the extent of the use made by the public of the service sought to be discontinued, alternate transportation service available in the area, the costs incurred and financial losses sustained by the carrier in providing the service under consideration, and the carrier's financial condition. No one of such factors by itself is conclusive or controlling. The burden imposed upon the carrier and upon interstate commerce must be weighed against the need for the service. It is possible that the need for the service under certain circumstances may be so great as to warrant its continuation even at a loss to the carrier. This could arise where the loss of the service would inflict serious injury on the communities, while continuance of the service would impose a relatively slight financial burden on the carrier. The facts in this proceeding do not disclose such an overriding need for the continuance of the involved trains.

L&N began incurring substantial losses on these trains in 1967 ($505,361) even with mail revenues of over $1 million, express revenues over $300,000, and additional revenues from passengers interlined at Evansville, Ind., with Chicago & Eastern Illinois Railroad Co. (C&EI) trains Nos. 93 and 54 and connecting with L&N's trains Nos. 6 and 7 at

Nashville, via intermediate L&N trains Nos. 5 and 10. The C&EI trains were discontinued February 1, 1968, *Chicago & E.I.R. Co. Discontinuance—Chicago & Evansville*, 331 I.C.C. 447.

If the carrier were required to operate the subject trains for another year, it would suffer out-of-pocket losses in excess of $900,000 (computed on the basis of 1968 costs and revenues). Nothing in the record indicates that the deficit could be abated in future years. In addition to the loss of connecting passengers, railway postoffice cars have been eliminated, reducing mail revenues, and on April 1, 1968, railway express (from one to four cars daily) was diverted to truck over the highway.

The full burden of the trains can be better visualized by considering the total economies attainable upon their discontinuance. As shown in appendix C, by retaining a portion of their traffic through diversion to other L&N trains (estimated to produce revenues of $939,500) and incurring thereon costs estimated at $238,700, the carrier could avoid more than $2.3 million of its present costs and thus effect economies in the range of $1.6 million per year. This brings us face to face with the question of whether the public's need for these trains is so great that the nation's private enterprise carrier system must be required to provide for it at an annual out-of-pocket deficit exceeding $900,000 while foregoing the opportunity to effect economies of more than $1.6 million per year.

Before discussing this issue, we turn to a preliminary matter, raised in the briefs filed by the city of Chicago, Ill., and the metropolitan government of Nashville and Davidson County, Tenn., dealing with the decision in *Chicago & E.I.R. Co. Discontinuance—Chicago & Evansville, supra.* These litigants and others have instituted an action in the United States District Court for the Northern District of Illinois, entitled City of Chicago, et al. v United

States, et al., to set aside the said decision of the Commission. The parties here ask that we request L&N to continue the operation of trains Nos. 6 and 7 voluntarily, pending full judicial review of the *C&EI* decision, and, in the event of a refusal by L&N, that we seek a temporary restraining order prohibiting the discontinuance of the trains pending full judicial review.

It is clear that pursuant to the provisions of section 13a(1) of the act, once having entered upon an investigation, we must make the statutory findings needed either to sustain a discontinuance of the investigation, or to support an order requiring continuance of the service within the time limit prescribed by section 13a(1). The evidence before us clearly establishes that the operation of these trains is not required by public convenience and necessity, that the continued operation thereof will unduly burden interstate commerce, and that the investigation should be discontinued; and we so find. Under these circumstances we have no lawful basis for ordering a continuance to await (perhaps longer than a year) developments which, in the end, might or might not change the picture.

The people who have been using the trains for travel have done so largely on an occasional or standby basis. Their primary means of conveyance are the automobile and other nonrail modes. The testimony of the governmental leaders, business representatives, and others is clear proof of that. Many gave opinions about a need for rail passenger service in the interest of community and commercial growth, but few hard, realistic facts were advanced by them in support. On the other hand, the carrier's director of industrial development testified that of 1,726 new industries located on L&N lines in the past 8 years, 843 were at points that had no rail passenger service.

He specified the factors that industry in general considers in selecting a new site—mainly, availability of such things as labor, lower wage rates, lower taxes, utilities

freight transportation (rail, truck, air and water) economical freight rates, access to raw materials, and cultural facilities—but availability of rail passenger service was not among them. He knew of not a single instance where rail passenger service was even mentioned. This testimony stands uncontroverted by the factual evidence of record.

Even for the individual traveler who calls upon the L&N for his occasional trip, the demand for the service of these trains is minimal. As shown in appendix B, an average of but 2.4 persons per day use train No. 6 for through service from New Orleans to Cincinnati, and only 2 per day use train No. 7 for the through run in the opposite direction. The same is true for the usage to and from the intermediate points: for example, from Mobile, a city of a quarter million, to Birmingham (population 325,000) there are only 4 passengers per day, and to Nashville (population 250,000), only 4 per day.

Local traffic between points on the 490-mile segment between Louisville and Montgomery constitutes a third of the total number of passengers—about 50 of the approximately 150 daily average who board and deboard at the various points along the 927-mile route. This area, which includes Nashville, will continue to have daily service by trains Nos. 8 and 9, the Pan American, and ever-other-day service by trains Nos. 15 and 16, the South Wind. The Pan American will also be available for through passengers and for service at all points on the Hummingbird schedule. Also available are the six daily through schedules each way by bus serving practically all the points on the line, numerous bus runs on segments of the line and airline services heretofore described. From this record we conclude that these alternate services are reasonably adequate to meet the public need for common carrier transportation services. In the face of this conclusion, notwithstanding that some inconvenience to travelers may be encountered at times, we cannot overlook nor disregard the enormous

and ever increasing losses to the carrier. This is plainly a case where there are too many trains for the diminishing needs of the public on this line. With former sources of traffic and revenue unalaterably foreclosed while costs continue their upward spiral, the carrier cannot be expected to continue running a train upward of 1,000 miles each day for service along the way to about 150 persons—many of whom travel only short distances [1]—while subsidizing their travel at the rate of $14.50 out-of-pocket per passenger.

Shippers of express will have adequate service remaining by over-the-highway truck transportation, and by L&N trains Nos. 8 and 9. Buses operating over the highway also render express service. The Post Office Department will continue the mails, including parcel post, to all points by use of airplanes, trucks, and the L&N trains Nos. 8 and 9.

Considering, among other things, the sparing use now made of these long-line trains—not only by travelers, but also by the Post Office Department and shippers of express—the abundance of alternate transportation by rail and other modes and the magnitude of the financial burden which the carrier would have to bear if the trains were continued, this is precisely the kind of circumstance for which Congress designed the relief of section 13a(1). Efforts have been made to have the law amended, including recommentations to Congress by this Commission, to provide a statutory plan for solutions to the passenger train problem under modified criteria. However meritorious Congress may find those efforts to be, they cannot be embraced as elements for decision of the matter now before us. As an administrative agency we are bound by the law as it stands and must be governed by the intendment of Congress in its enactment.

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[1] For example, of the 1,763 boarding at Pascagoula during the 6 months covered by appendix B, 1,497 deboarded at Mobile, 40 miles away.

Employee representatives have requested that appropriate conditions be imposed for protection of employees who may be affected by the discontinuance. It is well established that we have no authority to impose employee protective conditions in a section 13a discontinuance case. The adverse effect of a discontinuance upon employees is a factor to be considered in evaluating public convenience and necessity. Having weighed such factor, we conclude that any possible adverse effect upon the carrier's employees, when considered with all other facts discussed herein, does not justify the findings we would have to make before we could lawfully order continued operation of the involved trains.

Contentions of the parties as to fact or law not specifically discussed herein have been considered and found to be without material significance or not justified.

We find that the operation by the Louisville and Nashville Railroad Company of passenger trains Nos. 6 and 7 between New Orleans, La., and Cincinnati, Ohio, is not required by the public convenience and necessity and that continued operation thereof would unduly burden interstate commerce.

An appropriate order will be entered discontinuing the investigation herein.

COMMISSIONER BUSH concurs in the result.

APPENDIX A

No. 6 Daily (Read down)	Miles		No. 7 Daily (Read up)	Population 1960
8:15 a.m.	0	Lv. New Orleans, La ---- Ar.	8:10 p.m.	665,000
8:20 a.m.	----	Lv. Carrollton Avenue ---- Lv.	7:50 p.m.	-------
--------	36	Lv. Rigolets ---- Lv.	--------	-------
--------	53	Lv. Waveland, Miss ---- Lv.	--------	1,108
9:29 a.m.	57	Lv. Bay St. Louis ---- Lv.	6:25 p.m.	5,073
9:51 a.m.	72	Lv. Gulfport ---- Lv.	6:00 p.m.	33,000
---------	79	Lv. Edgewater Park ---- Lv.	5:48 p.m.	750
10:07 a.m.	85	Lv. Biloxi ---- Lv.	5:40 p.m.	47,000
10:31 a.m.	105	Lv. Pascagoula ---- Lv.	5:10 p.m.	20,800
11:35 a.m.	----	Ar. Mobile, Ala ---- Lv.	4:15 p.m.	220,000
11:40 a.m.	145	Lv Mobile, Ala ---- Ar.	3:50 p.m.	-------
---------	169	Bay Minette ---- Lv.	3:05 p.m.	5,197
12:55 p.m.	----	Ar. Flomaton ---- Lv.	2:20 p.m.	1,454
1:00 p.m.	205	Lv. Flomaton ---- Ar.	2:20 p.m.	-------
---------	218	Brewton ---- Lv.	1:53 p.m.	6,309
---------	243	Evergreen ---- Lv.	1:28 p.m.	3,703
2:39 p.m.	279	Greenville ---- Lv.	12:53 p.m.	6,894
3:40 p.m.	----	Ar. Montgomery ---- Lv.	12:05 p.m.	146,000
4:10 p.m.	323	Lv. Montgomery ---- Ar.	10:30 a.m.	-------
6:10 p.m.	----	Ar. Birmingham ---- Lv.	8:15 a.m.	325,000
6:25 p.m.	421	Lv. Birmingham ---- Ar.	7:45 a.m.	-------
---------	473	Lv. Cullman, Ala ---- Lv.	---------	11,900
8:15 p.m.	506	Lv. Decatur ---- Lv.	5:59 a.m.	33,800
10:50 p.m.	----	Ar. Nashville, Tenn ---- Lv.	3:30 a.m.	250,887
11:35 p.m.	626	Lv. Nashville, Tenn ---- Ar.	2:25 a.m.	-------
1:00 a.m.	----	Ar. Bowling Green, Ky ---- Lv.	12:45 a.m.	32,800
1:20 a.m.	699	Lv. Bowling Green Ky ---- Ar.	12:20 a.m.	-------
2:30 a.m.	771	Lv. Elizabethtown ---- Lv.	11:06 p.m.	10,900
4:35 a.m.	----	Ar. Louisville ---- Lv.	11:10 p.m.	392,000
5:00 a.m.	813	Lv. Louisville ---- Ar.	10:45 p.m.	-------
7:40 a.m	922	Lv. Latonia (Covington) ---- Lv.	7:58 p.m.	57,000
8:10 a.m.	927	Ar. Cincinnati, Ohio ---- Lv.	7:40 p.m.	495,300

APPENDIX B

Louisville and Nashville Railroad Company, passengers handled on L&N Train No. 6 for 6 months period, November 1, 1967 to April 30, 1968

From	On	D/A*	Off	D/A*	To Bay St. Louis	Gulfport	Biloxi	Pascagoula	Mobile	Flomaton	Flomaton (L&N byd)	Greenville	Montgomery	Montgomery (OC)	Birmingham	Birmingham (OC)	Cullman	Decatur	Decatur (OC)	Nashville	Nashville (L&N byd)	Bowling Green	Elizabethtown	Louisville	Louisville (OC)	Latonia	Cincinnati	Cincinnati (OC)
New Orleans, La--------	1,404	18.7	------	------	345	282	395	171	909	56	12	33	254	--	143	---	6	37	--	236	60	10	4	69	---	---	24	139
New Orleans (OC)-------	889	4.9	------	------	4	52	89	16	175	25	58	4	95	35	57	6	1	24	5	38	12	3	3	131	2	---	19	37
Carrollton Avenue------	-----	-----	-----	-----	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---
Bay St. Louis, Miss----	275	1.5	349	1.9	---	188	5	4	20	---	---	---	19	--	11	2	---	1	--	1	12	---	---	---	---	---	4	7
Gulfport, Miss----------	758	4.2	522	2.9	---	---	229	122	51	1	---	7	36	--	41	31	3	21	--	19	92	1	---	11	---	---	33	60
Biloxi, Miss------------	1,081	5.9	718	3.9	---	---	---	459	114	2	---	2	83	--	52	46	---	13	--	20	124	---	---	21	---	3	37	105
Pascagoula, Miss--------	1,763	9.7	772	4.2	---	---	---	---	1,497	10	---	12	31	--	44	25	---	12	--	10	75	---	---	6	1	---	17	23
Mobile, Ala-------------	2,778	15.2	2,764	15.1	---	---	---	---	-----	88	7	63	473	1	402	262	30	150	4	71	710	2	2	66	1	---	123	343
Flomaton, Ala-----------	1,033	5.7	162	0.9	---	---	---	---	-----	---	---	25	86	--	144	77	14	39	--	59	290	3	8	33	3	---	97	155
Flomaton (L&N byd)------	919	5.0	77	0.4	---	---	---	---	-----	---	---	3	41	2	119	112	7	14	3	104	239	1	1	26	---	---	49	98
Greenville, Ala---------	142	2.4	149	0.8	---	---	---	---	-----	---	---	---	57	1	125	18	---	16	--	11	64	---	---	12	---	---	43	95
Montgomery, Ala---------	4,329	23.8	1,175	6.5	---	---	---	---	-----	---	---	---	---	--	1,086	280	48	194	3	254	1,303	7	4	143	---	---	366	641
Montgomery (OC)---------	90	0.5	39	0.2	---	---	---	---	-----	---	---	---	---	---	12	---	---	1	--	5	36	---	---	5	1	---	16	14
Birmingham, Ala---------	4,519	24.8	2,236	12.3	---	---	---	---	-----	---	---	---	---	---	---	---	148	166	--	591	1,682	22	22	256	4	1	587	1,040
Birmingham, (OC)--------	168	0.9	859	4.7	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	27	26	---	---	6	---	---	21	88
Cullman, Ala------------	309	1.7	257	1.4	---	---	---	---	-----	---	---	---	---	---	---	---	---	5	--	14	219	---	---	15	---	2	23	31
Decatur, Ala------------	1,594	8.8	693	3.8	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	102	968	1	11	161	---	2	134	215
Decatur (OC)------------	-----	-----	15	0.1	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	---	-----	---	---	-----	---	---	-----	-----
Nashville, Tenn---------	863	4.7	1,562	8.6	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	37	7	206	7	4	223	379
Nashville,Tenn (L&N byd)	656	3.6	5,912	32.5	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	19	7	328	---	---	148	154
Bowling Green, Ky-------	266	1.5	106	0.6	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	---	3	177	2	1	42	41
Bowling Green,(L&N byd)	1,143	6.3	-----	-----	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	---	8	494	1	9	293	338
Elizabethtown, Ky-------	5	0.1	80	0.4	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	---	---	2	---	---	---	3
Louisville, Ky----------	674	3.7	2,168	11.9	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	---	---	-----	---	8	293	373
Louisville (OC)---------	-----	-----	22	0.1	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	---	---	-----	---	---	-----	-----
Latonia, Ky-------------	-----	-----	31	0.2	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	---	---	-----	---	---	-----	-----
Cincinnati, Ohio--------	-----	-----	2,811	15.4	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	---	---	-----	---	---	-----	-----
Cincinnati (OC)---------	-----	-----	4,479	24.6	---	---	---	---	-----	---	---	---	---	---	---	---	---	---	---	-----	-----	---	---	-----	---	---	-----	-----
Total-------------------	27,958	153.6	27,958	153.6	349	522	718	772	2,764	162	77	149	1,175	39	2,236	859	257	693	15	1,562	5,912	106	80	2,168	22	31	2,811	4,479

*D/A daily average.

Louisville and Nashville Railroad Company, passengers handled on Train No. 7 for 6 months period, November 1, 1967 through April 30, 1968

From	To On	D/A*	Off	D/A*	Louisville	Louisville (OC)	Elizabethtown	Bowling Green	Bowling Green (L&N byd)	Nashville	Nashville (L&N byd)	Decatur	Decatur (OC)	Cullman	Birmingham	Birmingham (OC)
Cincinnati, Ohio	2,301	15.3	-----	-----	383	--	5	120	366	300	129	104	-	28	498	89
Cincinnati (OC)	3,960	21.8	-----	-----	482	2	3	45	310	285	235	175	2	36	848	81
Latonia, Ky.	36	0.2	-----	-----	14	12	1	3	1	---	---	2	-	2	1	---
Louisville, Ky.	3,531	19.4	879	4.8	---	--	16	1,334	516	195	413	136	1	4	333	68
Louisville (OC)	101	0.6	14	0.1	---	--	--	1	2	10	7	---	-	---	4	---
Elizabethtown, Ky.	73	0.4	23	0.1	---	--	--	26	8	7	12	2	-	---	6	4
Bowling Green, Ky	117	0.6	1,529	8.4	---	--	--	-----	---	19	40	5	-	1	7	7
Bowling Green (L&N byd)	-----	-----	1,203	6.6	---	--	--	-----	---	--	---	---	-	---	---	---
Nashville, Tenn	464	2.5	816	4.5	---	--	--	-----	---	--	---	26	-	2	142	14
Nashville (L&N byd)	329	1.8	1,179	6.5	---	--	--	-----	---	--	---	727	1	138	1,661	144
Decatur, Ala.	329	1.8	1,179	6.5	---	--	--	-----	---	--	---	---	-	3	51	10
Decatur (OC)	13	0.1	4	0.1	---	--	--	-----	---	--	---	---	-	---	2	4
Cullman, Ala.	49	0.3	214	1.2	---	--	--	-----	---	--	---	---	-	---	7	---
Birmingham, Ala.	1,550	8.6	3,560	19.6	---	--	--	-----	---	--	---	---	-	---	-----	---
Birmingham (OC)	239	1.3	421	2.3	---	--	--	-----	---	--	---	---	-	---	-----	---
Montgomery, Ala.	1,364	7.5	3,601	19.8	---	--	--	-----	---	--	---	---	-	---	-----	---
Montgomery (OC)	3,557	19.5	50	0.3	---	--	--	-----	---	--	---	---	-	---	-----	---
Greenville, Ala.	112	0.6	550	3.0	---	--	--	-----	---	--	---	---	-	---	-----	---
Evergreen, Ala.	12	0.1	117	0.6	---	--	--	-----	---	--	---	---	-	---	-----	---
Brewton, Ala.	100	0.5	142	0.7	---	--	--	-----	---	--	---	---	-	---	-----	---
Flomaton, Ala.	118	0.6	1,044	5.7	---	--	--	-----	---	--	---	---	-	---	-----	---
Flomaton (L&N byd)	81	0.4	777	4.3	---	--	--	-----	---	--	---	---	-	---	-----	---
Bay Minette, Ala.	2	0.1	69	0.4	---	--	--	-----	---	--	---	---	-	---	-----	---
Mobile, Ala.	1,548	8.5	3,117	17.1	---	--	--	-----	---	--	---	---	-	---	-----	---
Pascagoula, Miss.	359	2.0	375	2.1	---	--	--	-----	---	--	---	---	-	---	-----	---
Biloxi, Miss.	534	2.9	785	4.3	---	--	--	-----	---	--	---	---	-	---	-----	---
Edgewater Park, Miss.	-----	----	7	0.1	---	--	--	-----	---	--	---	---	-	---	-----	---
Gulfport, Miss.	435	2.4	641	3.5	---	--	--	-----	---	--	---	---	-	---	-----	---
Bay St. Louis, Miss.	321	1.8	166	0.9	---	--	--	-----	---	--	---	---	-	---	-----	---
Waveland, Miss.	24	0.1	-----	-----	---	--	--	-----	---	--	---	---	-	---	-----	---
Carrollton Avenue	-----	----	4,445	24.4	---	--	--	-----	---	--	---	---	-	---	-----	---
New Orleans, La.	-----	----	944	5.2	---	--	--	-----	---	--	---	---	-	---	-----	---
New Orleans (OC)	-----	----	-----	-----	---	--	--	-----	---	--	---	---	-	---	-----	---
Total	27,508	151.1	27,508	151.1	979	14	23	1,529	1,203	816	836	1,179	4	214	3,560	471

*D/A daily average

Louisville and Nashville Railroad Company, passengers handled on Train No. 7 for 6 months period, November 1, 1967 through April 30, 1968--Continued

From \ To	Montgomery	Montgomery (OC)	Greenville	Evergreen	Brewton	Flomaton	Flomaton (L&N byd)	Bay Minette	Mobile	Pascagoula	Biloxi	Edgewater Park	Gulfport	Bay St. Louis	Waveland	Carrollton Ave.	New Orleans	New Orleans (OC)
Cincinnati, Ohio	525	3	30	9	15	64	35	3	125	16	29	-	22	5	-	-	196	5
Cincinnati (OC)	514	10	81	17	10	117	100	8	286	11	77	-	46	6	-	-	144	29
Latonia, Ky	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---
Louisville, Ky	228	4	3	--	5	33	14	-	64	13	22	-	12	3	-	-	97	20
Louisville (OC)	4	2	--	--	--	2	3	-	3	--	1	-	--	-	-	-	1	61
Elizabethtown, Ky	2	---	---	--	--	1	2	-	1	--	--	-	--	-	-	-	2	--
Bowling Green, Ky	15	---	---	--	--	2	2	-	5	--	1	-	2	-	-	-	9	2
Bowling Green (L&N byd)	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---
Nashville, Tenn	116	2	5	1	1	39	16	2	41	2	9	-	7	-	-	-	24	15
Nashville (L&N byd)	1,379	28	38	21	22	237	209	3	601	69	107	1	97	9	-	-	67	10
Decatur, Ala	94	-	10	7	3	33	7	1	62	14	6	-	10	-	-	-	15	3
Decatur (OC)	2	---	---	--	--	---	1	-	3	--	1	-	--	-	-	-	--	--
Cullman, Ala	25	---	---	--	2	3	---	-	7	1	--	-	2	1	-	-	1	--
Birmingham, Ala	802	---	96	13	4	97	53	11	273	21	38	-	23	4	-	-	112	12
Birmingham (OC)	95	4	11	--	--	18	11	-	62	7	16	-	6	-	-	-	2	7
Montgomery, Ala	---	---	228	8	19	55	45	1	498	30	88	2	53	8	-	-	288	41
Montgomery (OC)	---	---	48	41	61	245	277	32	996	82	255	-	265	40	-	-	875	340
Greenville, Ala	---	---	---	--	--	4	2	-	48	5	3	-	5	-	-	-	36	9
Evergreen, Ala	---	---	---	--	--	1	---	-	--	--	1	-	--	-	-	-	10	--
Brewton, Ala	---	---	---	--	--	93	---	-	2	2	-	-	--	-	-	-	3	--
Flomaton, Ala	---	---	---	--	--	---	---	5	35	6	3	-	6	-	-	-	40	23
Flomaton (L&N byd)	---	---	---	--	--	---	---	3	5	-	4	-	3	-	-	-	27	39
Bay Minette, Ala	---	---	---	--	--	---	---	-	--	--	--	-	--	-	-	-	2	--
Mobile, Ala	---	---	---	--	--	---	---	-	--	96	80	4	47	33	-	-	1,145	143
Pascagoula, Miss	---	---	---	--	--	---	---	-	--	--	45	-	15	7	-	-	261	31
Biloxi, Miss	---	---	---	--	--	---	---	-	--	--	--	-	20	10	-	-	429	75
Edgewater Park, Miss	---	---	---	--	--	---	---	-	--	--	--	-	--	-	-	-	--	--
Gulfport, Miss	---	---	---	--	--	---	---	-	--	--	--	-	--	42	-	-	337	56
Bay St. Louis, Miss	---	---	---	--	--	---	---	-	--	--	--	-	--	--	-	-	317	4
Waveland, Miss	---	---	---	--	--	---	---	-	--	--	--	-	--	--	-	-	5	19
Carrollton Avenue	---	---	---	--	--	---	---	-	--	--	--	-	--	--	-	-	--	--
New Orleans, La	---	---	---	--	--	---	---	-	--	--	--	-	--	--	-	-	--	--
New Orleans (OC)	---	---	---	--	--	---	---	-	--	--	--	-	--	--	-	-	--	--
Total	3,601	50	550	117	142	1,044	777	69	3,117	375	785	7	841	166	-	-	4,445	944

APPENDIX C

	Year 1967 trains Nos. 6 and 7	First four months 1968 trains Nos. 6 and 7	Annual projection from actual results of April 1968 trains Nos. 6 and 7	Projected year 1968: Estimated revenues retained, expenses not saved from discontinuance of trains Nos. 6 and 7	Projected year 1968: Estimated revenues loss and expenses saved
Revenues:					
1. Passenger	$1,331,486	$246,925	$740,296	$399,037	$341,259
2. Dining	146,084	28,830	68,518	22,611	45,907
3. U. S. Mail	1,040,985	244,600	753,176	514,912	238,264
4. Express	309,519	52,608			
5. Baggage	2,525	1,784	5,817	2,909	2,908
6. Total	2,830,599	574,747	1,567,807	939,469	628,338
Expenses (out-of-pocket):					
7. Wages of train and enginecrews	721,702	229,576	652,530		652,530
8. Locomotive repairs	292,629	91,681	271,699		271,699
9. Locomotive fuel	258,266	80,914	239,785		239,785
10. Locomotive water, lubricants, and other supplies	35,168	11,018	32,652		32,652
11. Locomotive enginehouse expense	54,942	17,214	51,022		51,022
12. Locomotive depreciation	46,008	15,336	46,660		46,660
13. Car repairs	344,155	78,662	209,553	79,063	130,490
14. Car depreciation	23,966	5,268	15,042	8,476	6,566
15. Rent for passenger cars	171,884	26,769	45,565		45,565
16. Train supplies and expenses	278,192	58,296	143,685	42,407	101,278
17. Personal injury and livestock damage	86,526	28,684	86,554		86,554
18. Dining expenses	372,318	86,031	247,379	11,708	235,671
19. Pullman deficit	313,119	62,800	156,628		156,628
20. Cincinnati joint terminal expenses	328,134	89,898	255,618	64,604	191,014
21. Louisville joint terminal expenses	19,960				
22. Decatur joint terminal expenses	9,774	2,178	7,363	6,648	715
23. Montgomery joint terminal expenses	30,704	8,704	31,034	17,011	14,023
24. New Orleans joint terminal expenses	92,559	25,115	68,286	8,746	59,540
25. Total	3,480,006	918,144	2,561,055	238,663	2,322,392
26. Net out-of-pocket (Loss) gain	(649,407)	(343,397)	(993,248)		
27. Gain from feeder services	144,046	33,936	83,581		
28. Net out-of-pocket (Loss) after feeder gain	(505,361)	(309,461)	(909,667)		

Expenses—annual projection	2,322,392
Revenues—annual projection	628,338
Savings to L&N Railroad Company	1,694,054
Less projected feeder revenue gain	83,581
Net annual savings to L&N	1,610,473

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 3rd day of September, 1968.

Finance Docket No. 25047

LOUISVILLE AND NASHVILLE RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 6 AND 7 BETWEEN NEW ORLEANS, LA., AND CINCINNATI, OHIO

Investigation of the matters and things involved in this proceeding having been made pursuant to the order of said division, dated April 24, 1968, a hearing having been held and the said division on the date hereof having made and filed a report containing its findings of fact and conclusions thereon which report is hereby referred to and made a part hereof:

It is ordered, That this investigation be, and it is hereby, discontinued effective 35 days from the date of service of this order.

By the Commission, division 3.

H. NEIL GARSON,
Secretary.

(SEAL)

Service Date
November 4, 1968

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 31st day of October 1968.

Finance Docket No. 25047

LOUISVILLE AND NASHVILLE RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 6 AND 7 BETWEEN NEW ORLEANS, LA., AND CINCINNATI, OHIO

Upon consideration of the record in the above-entitled proceedings, the petition of Metropolitan Government of Nashville and Davidson County, Tenn., Tennessee Public Service Commission, Alabama Public Service Commission, State of Louisiana and the Cities of Chicago, Ill. and Birmingham and Montgomery, Ala., filed October 7, 1968, seeking reconsideration of the order of Division 3, served September 6, 1968; and the reply of the Louisville and Nashville Railroad Company filed October 9, 1968; and

It appearing, That the petition sets forth no material facts or arguments in addition to those previously considered in the proceeding; that there has been presented no error of fact or law with respect to matters complained of by petitioners; and that no showing has been made warranting reconsideration of said order;

It is ordered, That the petition for reconsideration be, and it is hereby denied.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF CHICAGO, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, VILLAGE OF MILFORD, CITY OF WATSEKA, CITY OF HOOPESTON, CITY OF DANVILLE, CITY OF TERRE HAUTE, CITY OF VINCENNES and MAURICE F. RADRIZZI,

Plaintiffs,

v. No. 68 C 956

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,

Defendants.

COMPLAINT

I.

Plaintiffs are communities and an official of a labor organization that attack various findings, decisions and orders of the Interstate Commerce Commission ("Commission"), entered under sections 5(2) and 13a(1) of the Interstate Commerce Act, 49 U.S.C. sections 5(2) and 13a(1), as follows:

(1) *Evansville Line:* Plaintiffs City of Chicago, Village of Milford, City of Watseka, City of Hoopeston, City of Danville, City of Terre Haute and City of Vincennes, are communities located on the so-called Evansville line of the Chicago & Eastern Illinois Railroad Company ("Eastern"), which line extends approximately 287 miles between Chicago, Ill. and Evansville, Ind.

(2) *South of Evansville:* Plaintiff The Metropolitan Government of Nashville and Davidson County Tennessee is a community located in the State of Tennessee situated on

the line of the Louisville and Nashville Railroad Company ("L&N"), which line extends approximately 159 miles between Evansville, Ind. and Nashville, Tenn.

(3) *Labor Organization:* Plaintiff Maurice F. Radrizzi is an official of the Brotherhood of Railroad Trainmen, the latter being the collective bargaining agent for certain employees operating joint Eastern-L&N passenger trains involved in this action between Chicago, Ill. and Atlanta, Ga.

II.

A. The plaintiffs listed in (1) and (3), above, (Evansville Line and Labor Organization), were parties to proceedings before the Interstate Commerce Commission known as Finance Docket No. 24725, *Chicago & Eastern Illinois Railroad Co.—Discontinuance of Trains Nos. 93 and 54 Between Chicago, Ill., and Evansville, Ind.*, reported at 331 I.C.C. 447, and attached hereto as Appendix 1. Findings and order were entered January 25 and served January 31, 1968, which found that the operation by Eastern of passenger trains 93 (southbound) and 54 (northbound) between Chicago, Ill. and Evansville, Ind. is not required by public convenience and necessity, and that continued operation thereof would unduly burden interstate or foreign commerce. The discontinuance became effective February 2, 1968. The discontinued portion was the service of joint Eastern-L&N trains 93 and 54 between Chicago, Ill. and Evansville, Ind. The trains now operate solely between Evansville, Ind. and Atlanta, Ga., with connections at Nashville, Tenn. for trains 6 and 7 between Nashville, Tenn. and Montgomery and Mobile, Ala. and New Orleans, La.

A number of the communities in (1), above, (Evansville Line), were parties in support of the acquisition of the Evansville Line by L&N in Finance Docket No. 21755, *Missouri Pac. R. Co.—Control—Chicago & E.I.R. Co.*, decided February 16, 1965, and reported at 327 I.C.C. 279. (See: 327 I.C.C. at 302)

B. The plaintiff listed in (2), above, (South of Evansville), The Metropolitan Government of Nashville and Davidson County Tennessee was not a party to Finance Docket No. 24725, *Chicago & Eastern Illinois Railroad Co.–Discontinuance of Trains Nos. 93 and 54 Between Chicago, Ill. and Evansville, Ill.*, and hearings were not held at Nashville, Tenn., or at any point south of Evansville, Ill., even though an estimated 75 percent of the passengers utilizing trains 93 and 54 travel between points located north of Evansville, Ind., on the one hand, and points located south of Evansville, Ind., on the other hand. The discontinuance of Eastern's segment of these joint Eastern-L&N through trains has severed all passenger train service between points north of Evansville, Ind., on the one hand, and points south of Evansville, Ind., on the other hand. Plaintiff The Metropolitan Government of Nashville and Davidson County Tennessee was not given notice by the posting of notices of the proposed discontinuance at stations in the Nashville area, as required by section 13a(1) of the Act and the Commission's regulations thereunder, and the Governor of Tennessee was not served with notice as specifically required by the statute.

A representative letter by a citizen of Tennessee to the Interstate Commerce Commission, and the reply by the agency, are attached hereto as Appendix 2. A representative letter by a citizen of Georgia to the Interstate Commerce Commission, and the reply by the agency, are attached hereto as Appendix 3.

III.

This action is brought under, and the United States is made a defendant under, and the jurisdiction of this court is conferred by, Title 28 of the United States Code, Sections 1336(a), 1398(a), 2321-25, inclusive, and 2284; Interstate Commerce Act (49 U.S.C. Section 1 et seq., and particularly sections 5(2), 13a(1) and 17(9); the Fifth Amendment to the Constitution of the United States; and

the Administrative Procedure Act, 5 U.S.C. sections 702-4, inclusive.

IV.

The venue of this action is in this Court, pursuant to the provisions of 28 U.S.C. 1398(a), referred to above, because plaintiff City of Chicago, among other plaintiffs, is located within the jurisdiction of this Court.

V.

Defendant United States of America is a statutory defendant which is named as a party pursuant to 28 U.S.C. 2322.

Defendant Interstate Commerce Commission is an administrative agency, created by the Act to Regulate Commerce, Approved February 4, 1887, 24 Stat. 283, and amendments thereto, now known as the Interstate Commerce Act, with specifically vested powers and duties respecting transportation in interstate and foreign commerce.

Defendant Chicago & Eastern Illinois Railroad Company is a railroad corporation with multiple lines of railroad in the Northern District of Illinois, with its principal office in Cook County, and which is doing business in the Northern District of Illinois.

VI.

This action seeks to enjoin, annul, suspend and set aside the following orders of the Interstate Commerce Commission:

A. Finance Docket No. 21755, *Missouri Pac. R. Co.–Control–Chicago & E.I.R. Co.*, in part. That portion of the decision and order of February 16, 1965 which overruled the recommended order of the hearing examiner that Eastern under Missouri Pacific Railroad control could not alter its passenger train schedules in such manner so as to cause connecting service to be broken. (327 I.C.C. at 307-308, 385-86)

B. Finance Docket No. 24725, *Chicago & E.I.R. Co. Discontinuance of Trains Nos. 93 and 54 Between Chicago, Ill. and Evansville, Ind.* The decision, order and findings entered January 25, 1968 (served January 31, 1968), and the order denying reconsideration entered May 8, 1968 (served May 15, 1968, as corrected). The order and corrected order of May 8, 1968 are attached hereto as Appendix 4 and Appendix 5.

VII.

The findings, decisions and orders of the Commission, set forth in Paragraph VI, above, are erroneous, unsupported by substantial evidence, without rational basis, lack the necessary findings, and are violative of due process, on the following grounds, among others:

A. *Control of Eastern (F.D. 21755)*

(1) In failing to adopt the recommendation of its hearing examiner in F.D. 21755 that a specific condition be imposed which would require resort to the Commission for modification of the order in F.D. 21755 prior to revision of passenger service, rather than merely ousting the States of Illinois and Indiana of jurisdiction over interstate trains by the filing of notices pursuant to section 13a(1) of the Act, assuming, arguendo, that state jurisdiction was in fact ousted;

(2) in failing to require compliance with its order of February 7, 1967 requiring that L&N submit an application for acquisition of the Evansville Line on or before February 7, 1968, and thereupon failing to consider this violation sufficient cause for joinder of Missouri Pacific in the proceeding as requested by certain of the plaintiffs herein. (See: 331 I.C.C. at 449);

B. *Trains 93 & 54 (F.D. 24725)*

(1) In finding that Missouri Pacific control of Eastern would be consistent with the public interest if L&N were included in the transaction, the Commission gave great

weight and repeated emphasis to the preservation and improvement of the then-existing joint Eastern-L&N passenger train service between points on the Evansville Line, on the one hand, and points south of Evansville, Ind., on the other hand, yet the Commission now finds in F.D. 24725 that the operation of interstate passenger service by Eastern is not required over the Evansville Line, so that the findings in F.D. 24725 are contradictory and irrational. (Compare 327 I.C.C. at 294, 298, 301, 332, 338, 361-62, with the ultimate findings in 331 I.C.C. at 462);

(2) in finding that Eastern invoked federal jurisdiction, and superseded state jurisdiction, over the Chicago, Ill.–Atlanta, Ga. trains, merely by posting notices of the proposed discontinuance at stations served by Eastern in Illinois and Indiana, serving the Governors of Illinois and Indiana with the notice, posting notices on the train itself, and filing said notice with the Interstate Commerce Commission, because the statute requires that all stations served by the trains and all of the Governors of the involved states must be provided notice in order for federal jurisdiction to be invoked with respect to the train or any part of the train;

(3) in failing to dismiss the proceeding for failure of Eastern to serve notice of the proposed discontinuance upon the Governors of the States of Kentucky, Tennessee and Georgia, as required by section 13a(1) and the Commission's rules thereunder;

(4) in failing to dismiss the proceeding for failure of Eastern to file its notice and supporting statement with the regulatory bodies of the States of Kentucky, Tennessee and Georgia in accordance with 49 CFR 1122.5j;

(5) in failing to dismiss the proceeding for failure of Eastern to serve the Governor and state regulatory bodies of the States of Kentucky, Tennessee and Georgia with the order instituting the investigation, in accordance with 49 CFR 1100.246(d);

(6) in failing to dismiss the proceeding for failure of Eastern or L&N to post notices of the proposed discontinuance at stations south of Evansville, Ind. served by trains 93 and 54.

(7) in failing to dismiss the proceeding for failure of Eastern to specify in the notice the through-route nature of the trains south of Evansville;

(8) in finding, in essence, that Eastern's operation of trains 93 and 54 is a separate "train", apart from L&N's segment of trains 93 and 54, for the purposes of section 13a(1), whereas the train is advertised to the public as an entity, the equipment is in through pool service, both carriers employ the same train numbers for the train, and L&N has a financial interest in Eastern;

(9) in failing to render findings as to whether trains 93 and 54, for their entire runs between Chicago, Ill. and Atlanta, Ga., are required by public convenience and necessity and would unduly burden interstate or foreign commerce, as required by section 13a(1);

(10) in failing to make the requisite subsidiary findings as to the impact of the discontinuance of the segment of the trains north of Evansville, Ind. upon the viability of the segment of train service south of Evansville, Ind.;

(11) in failing to permit the intervention of the Tennessee Public Service Commission in the proceeding;

(12) in failing to provide a minimum of 30 days before which its order of January 25, 1968 would take effect discontinuing the investigation, in violation of section 15(2) of the Act;

(13) in prejudging petitions for reconsideration in reopening Finance Docket No. 24646, *Louisville & Nashville Railroad Co. Discontinuance of Trains Nos. 53 and 92 Between St. Louis, Mo. and Nashville, Tenn.*, on the specific ground that Eastern's segment of the trains had been discontinued, whereas under the Commission's rules the January 25, 1968 findings were only tentative and non-final, 49 CFR

1100.101(a)(2), the November 22, 1967 report being attached hereto as Appendix 6 (reported at 331 I.C.C. 203), and the March 12, 1968 order reopening the proceeding being attached hereto as Appendix 7;

(14) in prejudging petitions for reconsideration by the March 12, 1967 order reopening Finance Docket No. 24646, described in (13), above, when exceptions were due to be filed March 14, 1968 in Finance Docket No. 24726, *Chicago & Eastern Illinois Railroad Company Discontinuance of Trains Nos. 3 and 4 Between Chicago and Danville, Ill.*, in view of the fact that the record in F.D. 24725 and F.D. 24726 were consolidated, so that consideration of exceptions to the recommended report in F.D. 24726 must be made prior to acting upon petitions for reconsideration in F.D. 24725 to avoid inconsistent rulings on disputed evidence common to both proceedings;

(15) in prejudging petitions for reconsideration by advising persons that the findings and decision of January 25, 1968 were final, whereas the findings and decision were only tentative and subject to petitions for reconsideration by such persons, even though they resided south of Evansville, Ind., in marked contrast with the usual policy of the Commission to advise persons of their right to seek reconsideration, an example of this prejudgment being the letter of Commissioner Murphy to the Unique Knitting Company at Acworth, Ga., attached hereto as Appendix 3;

(16) in failing to join Missouri Pacific Railroad Company as a party to the proceeding as requested by several protestants;

(17) in failing to promptly issue a final order upon petitions for reconsideration when, in fact, the actual determination prejudging the petitions for reconsideration was made March 12, 1968 by Division 3, acting as an Appellate Division, in reopening F.D. 24646, and on the same date Eastern signed an agreement with L&N whereby the latter would acquire the Evansville Line, the latter having signed the agreement on March 8, 1968.

(18) in rendering findings based upon the availability of alternate service which were not supported by evidence relating to train travel between specific points on Eastern, on the one hand, and points on L&N, on the other hand;

(19) in rendering findings based upon a train schedule which was superseded by a new schedule at the time of the hearings, the schedule shown in the report not indicating service at Watseka and Hoopeston, Ill.;

(20) in rendering findings based upon an incorrect consist for the trains, the report omitting an express car on train 93 between Chicago, Ill. and Chattanooga, Tenn., as well as an express car on train 54 between Nashville, Tenn. and Chicago, Ill.;

(21) in failing to credit Eastern's segment of the trains with feeder value for revenue earned on L&N's segment of the trains, recognized as proper by L&N in its reply to the petition of City of Carmi (Illinois) in Finance Docket No. 24646;

(22) erroneously stated in its report that patrons of Eastern's trains could use Illinois Central Railroad Company passenger train service, because the latter railroad can hardly be expected to expand its service to accommodate Evansville Line passengers in view of the decision of this court on August 4, 1966 in *Illinois Central Railroad Company v. United States,* 263 F. Supp. 421, aff'd per curiam 385 U.S. 457 (1967);

(23) erroneously stated in its report that a major bus line operates four northbound buses daily between Evansville, Ind. and Chicago, Ill., whereas only three buses are so operated;

(24) erroneously found that the first (last) six months of 1967 represented the present level of patronage of the trains, since travel on the trains is heavier in the last six months of the year;

(25) erroneously gave weight to the asserted Eastern passenger deficits in excess of $1 million in each year for

the years 1962 through 1966, when Eastern itself did not claim such losses and where the actual losses for the entire Eastern system, on Eastern's own basis, could not exceed $500,000 for the year 1966;

(26) erroneously found that passenger utilization of trains 93 and 54 was dwindling;

(27) erroneously failed to offset claimed savings by the discontinuance of trains 93 and 54 with the added expenses incurred in transporting mail in TOFC (piggyback) service, in marked contrast to the crediting of such additional mail expense for L&N in Finance Docket No. 24646, 331 I.C.C. at 455-56, involving companion trains Nos. 92 and 53 between St. Louis, Mo. and Nashville, Tenn.;

(28) erroneously found that discontinuance by Eastern of trains 93 and 54 is consistent with the purpose of section 13a(1) of the act, and the objectives of the National Transportation Policy;

(29) in failing to render any subsidiary findings as to the probable effect of the discontinuance of Eastern's segment of trains 93 and 54 upon railroad employees;

(30) in failing to consider and to evaluate passenger utilization statistics presented in evidence by Eastern for the months of June, July, August and September, 1967;

(31) in failing to find that utilization of the trains and passenger revenue for Eastern's segment of the trains increased in the first six months of 1967 over the comparable period in 1966;

(32) in finding that Eastern's segment of the trains is not required by public convenience and necessity, and would unduly burden interstate or foreign commerce;

(33) erroneously failed to take official notice of the findings in Finance Docket 24646 that discontinuance of Eastern's segment of trains 93 and 54 would adversely affect the operation of L&N's segment of these trains (331 I.C.C. at 215), and to consider such impact in determining

whether Eastern's part of the trains should be continued in Finance Docket No. 24725;

(34) erroneously relied upon its findings in F.D. 21755 as to Eastern's financial condition, when such findings were repudiated by this Court as "unquestionably stale", *Illinois Central Railroad Company v. United States*, 263 F. Supp. at 434;

(35) erroneously included general overhead expenses in determining the savings upon discontinuance of Eastern's segment of trains 93 and 54;

(36) erroneously included passenger car and locomotive depreciation expense in determining the savings upon discontinuance when the record does not indicate that any such equipment would be retired upon discontinuance;

(37) erroneously included joint facility expenses for the Chicago & Western Indiana Railroad Company as savable upon discontinuance, in view of there being no such reduction in expenses upon discontinuance, together with the obligation of L&N to assume all passenger expenses and one-half of Eastern's entire obligation to Chicago & Western Indiana Railroad Company (327 I.C.C. at 362, 386);

VIII.

The deficiencies in the findings, decisions and orders of the Commission proceedings specified in Paragraph VI and Paragraph VII, among others, if not enjoined annulled, suspended and set aside, would operate to the substantial damage and irreparable injury of plaintiffs, and these plaintiffs are without an adequate remedy at law.

IX.

WHEREFORE, plaintiffs respectfully pray:

1. That a court constituted as required by 28 U.S.C. Sections 2284 and 2321-2325 inclusive, consisting of three judges, of whom at least one shall be a circuit judge, be convened, unless this action is deemed to be a supplemental

proceeding to No. 65-C-1393, for which a three-judge court has been convened previously.

2. That the court of three judges, upon final hearing of this suit enter a decree permanently suspending, enjoining, setting aside and annulling the said orders of the Interstate Commerce Commission, in whole or in part, as complained of herein.

3. That plaintiffs have such other and further relief in the premises as to the court may seem required by equity and as may be deemed fit and proper.

RAYMOND F. SIMON, *Corporation Counsel*
BERNARD RANE, *Asst. Corp. Counsel*
City of Chicago
511 City Hall Bldg.
Chicago, Ill. 60602

NEILL S. BROWN
ROBERT E. KENDRICK
204 Metropolitan Courthouse Bldg.
Nashville, Tenn. 37201

WENDELL W. WRIGHT
MARION E. WRIGHT
106 N. Vermilion Street
Danville, Ill. 61833

WILLIAM E. NELSON
Dyer Building
Hoopeston, Ill.

KEITH E. ROBERTS
120 S. LaSalle Street
Chicago, Ill. 60603

GEORGE B. TOFAUTE
17 Harding Avenue
Terre Haute, Ind. 47801

ROBERT P. DOOLITTLE, JR.
801 Busseron Street
Vincennes, Ind.

GORDON P. MacDOUGALL
705 Ring Building
Washington, D. C. 20036

Dated at
Chicago, Ill.
May 27, 1968

CERTIFICATE OF SERVICE

I hereby certify that the following parties in No. 65-C-1393 were served a copy of the foregoing by first-class mail' postage prepaid on May 27, 1968:

HARRY R. BEGLEY
Attorney for Louisville & Nashville R.R. Co.
38 S. Dearborn Street
Chicago, Ill.

LEON LEIGHTON
Pro Se
6 East 45th Street
New York, N.Y. 10017

ALBERT E. JENNER, JR.
Attorney for Missouri Pacific R.R. Co.
135 S. LaSalle Street
Chicago, Ill.

WILLIAM J. O'BRIEN, JR.
Attorney for Illinois Central R.R. Co.
135 East 11th Place
Chicago, Ill. 60605

JOHN B. GOODRICH
Attorney for Monon Railroad
332 S. Michigan Avenue
Chicago, Ill. 60604

NUEL D. BELNAP
Attorney for St. Louis-Southwestern Ry. Lines
One North LaSalle Street
Chicago, Ill.

BERNARD RANE, Asst. Corp. Counsel
City of Chicago
511 City Hall Building
Chicago, Ill. 60602

Dated at
Chicago, Ill.
May 27, 1968

APPENDIX 1

Report and Order of Interstate Commerce Commission in Finance Docket No. 24725 entered January 25, 1968 (331 I.C.C. 447)

APPENDIX 2

VANDERBILT UNIVERSITY
News Bureau
Nashville, Tennessee 37203

[F.D. 24725]

March 21, 1968

[Interstate Commerce Commission
Received Mar. 22, 1968
Records & Service Mail Branch]

Secretary
Interstate Commerce Commission
Washington, D.C.

Dear Sirs:

In trying to make reservations for a train trip from Nashville to Chicago, I was informed by L&N that they no longer have daily service into Chicago. This comes as quite a shock because on my recent trips aboard the Georgian

(train #3-7) there were many people on the train. Also, it comes as a surprise because the ICC made the L&N maintain the only direct service between Nashville and St. Louis, and I would assume that passenger train service between Nashville and Chicago would be much more in the public interest, convenience, and necessity than even the St. Louis-Evansville run because so many more persons use the train.

I would have protested the proposed discontinuance of this train had I known it was to be discontinued. I thought that public announcement and public display of the discontinuance application were required in all stations affected by the action. There was no public display of the application in Union Station at Nashville—and since this action halts all daily train service between Nashville and Chicago, I would think that the display of intentions to discontinue would have been mandatory. I realize that the segment involved halts service only between Evansville and Chicago on the C&EI, but this action affects all stations between Chicago and Atlanta and between Chicago and New Orleans.

This matter can still be corrected. A condition of the ICC's approval of the L&N's purchase of the Evansville-Chicago division of the C&EI should be that through passenger service be restored into Chicago. As indicated by the L&N's long, hard fight for the C&EI, the financial rewards of the acquisition will be great. It wouldn't be too much to ask that passenger service be restored as a condition of the purchase.

I would like to know if public hearings were held on this discontinuance; and if not, why not. Also, why was there insufficient notification of potential passengers in Nashville, Atlanta, and New Orleans? Finally, what are the chances of the ICC requiring resumption of this vital service as a condition of the L&N's purchase of the C&EI?

Sincerely,

/s/ Gerald Wood

5337
[File in Docket]

April 1, 1968

Mr. Gerald Wood
News Bureau
Vanderbilt University
Nashville, Tennessee 37203

Dear Mr. Wood:

Reference is made to your letter of March 21, 1968, concerning the discontinuance of the Georgian passenger train between St. Louis and Evansville, Indiana, which was discontinued January 31, 1968. I note your desire that this service be resumed, perhaps as a condition to permitting the L&N to purchase the Evansville line of the Chicago and Eastern Illinois Railroad.

The city of Chicago and several other parties have filed petitions in Finance Docket No. 24725 requesting the Commission to reconsider its findings of January 25, 1968, that continuance of the Georgian passenger trains between Chicago and Evansville was not required by the public convenience and necessity and that their continued operation would unduly burden interstate commerce. The matter is now receiving the consideration of the Commission and I have arranged for you to be sent a copy of its decision.

The application of the Louisville and Nashville Railroad Company to acquire the Evansville line of the Chicago and Eastern Illinois was filed March 19, 1968, in Finance Docket No. 25031. Any requests for the imposition of a condition such as you suggest in your letter should be made through the submission of a formal pleading in that proceeding.

Sincerely yours,

[ADVISE OF ALL PROCEEDINGS]

RICHARD BLOCK, JR.
Asst. Deputy Director
Section of Opinions

GWM:vc
OPO

APPENDIX 3

UNIQUE KNITTING COMPANY
Acworth, Georgia

February 12, 1968

[Received Feb. 15, 1968
8:46 A.M.
Commissioner Murphy]

Louisville & Nashville Railroad Company,
908 W. Broadway,
Louisville, Kentucky 40201

Gentlemen:

As none of us up here fly, and must get to Chicago on business occasionally, we were shocked to read that ICC granted C./E.I. permission to discontinue Pullman service between Evansville, Indiana, and Chicago, which in turn eliminates Pullman service on the L&N between Atlanta and Chicago.

It may be poor railroading, but we wonder if concentrated traffic, two days a week, for Pullman service would help financially?

Another important factor is that the Atlanta Airport is a 90 mile round trip (45 miles one way) from here, which means another 90 mile trip upon return arrival; total 180 miles as a side line to main trip to Chicago. Planes seem to leave and arrive during Freeway rush periods, and two and a half hours down, and also return can consume eight to ten hours, which is a whole day wasted. This is against meeting The Georgian in Marietta, (ten miles distant) in about twenty or twenty-five minutes—or at most one hour round trip.

It is difficult to understand the ICC granting something to C./E.I. without considering the L&N and their customers.

We hope that you and C./E.I. can arrange at least partial Pullman service to alleviate some of our business travel worries. Thanks.

Yours very truly,

UNIQUE KNITTING COMPANY,

F. J. Kienel
gl

c.c. ICC–Washington, D.C.
c.c. Congressman John W. Davis
c.c. Cobb County Chamber of Commerce
c.c. Georgia State Chamber of Commerce
c.c. Louisville & Nashville RR–Atlanta

[File in Docket]

February 16, 1968

Mr. F. J. Kienel
Unique Knitting Company
Acworth, Georgia 30101

Dear Mr. Kienel:

This will acknowledge receipt of the copy of the letter you addressed to the Louisville & Nashville Railroad Company concerning the discontinuance of Pullman service by the Chicago & Eastern Illinois Railroad between Evansville, Indiana, and Chicago, Illinois. I note your statement that this in turn eliminates Pullman service on the L&N between Atlanta and Chicago, and your inquiry concerning the advisability of operating Pullman service two days a week.

The Commission instituted an investigation of the notice filed by the C&EI in Finance Docket No. 24725, held public hearings, and issued a report and order dated January 25, 1968, in which it found that passenger trains Nos. 93 and 54 between Chicago and Evansville were not

required by the public convenience and necessity and that their continued operation will unduly burden interstate commerce. A number of persons in opposition to the discontinuance testified at the hearings and the Commission considered the evidence of record in the light of the statutory criteria governing train discontinuance cases. I am enclosing a copy of the Commission's report which refers to some of the evidence submitted in the case and sets forth the Commission's reasons in support of its ultimate conclusion. You will note that the Commission found that continued operation of the trains would result in an out-of-pocket loss to the C&EI of over $400,000 per year with the prospects that the deficit would go beyond a half million dollars.

This Commission has no jurisdiction over your suggestion for providing Pullman service two days a week in the absence of a filing by the railroad concerned of a notice under section 13a(1) of the Interstate Commerce Act. That section provides that a railroad may, but is not required to, file a notice with this Commission advising of its intention to change or discontinue passenger train service. In the absence of such a filing the proposed change or discontinuance of service is a matter within the administrative discretion of the railroad unless the States in which the trains operate have enacted laws regulating such matters.

The Commission considers the needs of all persons and communities served by the trains proposed for discontinuance. It recognizes that the discontinuance of any passenger train will probably result in inconvenience to some persons. However, the Commission must be guided in its final determination by the provisions set forth in the law governing such proceedings.

Sincerely yours,

/s/ Rupert L. Murphy
Commissioner

Enclosure

APPENDIX 4

Order of Interstate Commerce Commission on reconsideration in Finance Docket No. 24725 entered May 8, 1968.

* * *

APPENDIX 5

Corrected order of Interstate Commerce Commission on reconsideration in Finance Docket No. 24725 entered May 8 and served May 15, 1968.

* * *

APPENDIX 6

Report and Order of Interstate Commerce Commission in Finance Docket No. 24646, entered November 22, 1967 (331 I.C.C. 203).

* * *

APPENDIX 7

Order of Interstate Commerce Commission in Finance Docket No. 24646 entered March 12, 1968.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF CHICAGO, et al.,

Plaintiffs,

v. No. 68 C 956

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,

Defendants.

MOTION OF DEFENDANT
CHICAGO AND EASTERN ILLINOIS
RAILROAD COMPANY

I.

Motion To Dismiss Complaint

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, defendant Chicago and Eastern Illinois Railroad Company ("Eastern") moves for entry of an order dismissing the complaint, on the following grounds:

1. This Court is without jurisdiction of the subject matter of plaintiffs' complaint.

(a) Plaintiff seeks review of an order of the Interstate Commerce Commission ("Commission") discontinuing an investigation pursuant to Section 13a(1) of the Interstate Commerce Act into the proposed discontinuance of Eastern's trains Nos. 93 and 54 between Chicago, Illinois and Evansville, Indiana. Said investigation was discontinued on January 25, 1968, and notice was served January 31, 1968.

(b) The Commission's discontinuance of an investigation of the proposed discontinuance of an interstate train is not subject to review by a United States District Court.

2. Plaintiffs are without standing to seek review of the Commission's action in this case.

(a) Plaintiff Metropolitan Government of Nashville and Davidson County, Tennessee purports to represent the citizens of an area which is not located along the route of discontinued trains 93 and 54. Neither said plaintiff nor its citizens have any interest in the discontinuation of said trains, nor have they suffered any injury thereby. It is without standing to bring this action on its own behalf or in a representative capacity.

(b) Plaintiffs City of Chicago, Village of Milford, City of Watseka, City of Hoopeston, City of Terre Haute and City of Vincennes, are municipal corporations whose areas were served by trains 93 and 54. These plaintiffs purport to sue on behalf of the citizens of their communities. None of said municipal corporations has any direct interest in or has suffered any direct, proximate or cognizable injury from the discontinuation of trains 93 and 54. They are without standing to bring this action in a representative capacity or otherwise.

(c) Plaintiff Maurice F. Radrizzi, an official of the Brotherhood of Railroad Trainmen, has not been personally affected by discontinuance of trains 93 and 54, nor does he allege any direct, proximate or cognizable injury from the discontinuation of trains 93 and 54. He is without standing to bring this action in a representative capacity or otherwise.

3. The complaint fails to state a claim upon which relief can be granted.

II.

Alternative Motion To Strike Portions of the Complaint

In the alternative, solely in the event the Court denies the foregoing motion to dismiss, Eastern moves for entry of an order striking the following paragraphs of the complaint on the grounds set forth below:

1. *Paragraphs VI(A) and VII(A)(1).*

(a) In these paragraphs, plaintiffs seek to challenge collaterally a portion of the order entered by the Commission on February 16, 1965 in Finance Docket No. 21755, *Missouri Pacific Railroad Co.–Control–Chicago & Eastern Illinois Railroad Co.*, 327 I.C.C. 279. That order was affirmed by a three-judge court in this District (Judges Schnackenberg and Decker, Chief Judge Campbell dissenting), and by the United States Supreme Court. *Illinois Central Railroad Co. v. United States*, 385 U.S. 457 (1967), *affirming per curiam* 263 F. Supp. 421 (N.D. Ill. 1966).

(b) Plaintiffs are barred by principles of *res judicata* and collateral estoppel from challenging the Commission's order in Finance Docket No. 21755.

(c) In this action to review the Commission's order in Finance Docket No. 24725, plaintiffs may not seek review of an order entered by the Commission in Finance Docket No. 21755.

(d) Plaintiffs may not at this time obtain review of the order entered by the Commission in 1965 in Finance Docket No. 21755, since more than three years have elapsed since the Commission entered the order.

(e) The Commission, in Finance Docket No. 24725, has conducted a new investigation as to whether or not trains 93 and 54 should be discontinued. The

Commission's discontinuance of that investigation supersedes, as to trains 93 and 54, matters considered in Finance Docket No. 21755 which were in any way relevant to the subject to discontinuance of trains by Eastern.

(f) Neither in the case here under review (Finance Docket No. 24725), nor in Finance Docket No. 21755, did plaintiffs raise before the Commission the objections they now seek to raise in paragraphs VI(A) and VII(A)(1) of the complaint. Plaintiffs are limited to raising before this Court the objections which they raised before the Commission. All other objections are waived.

(g) Neither in the case here under review (Finance Docket No. 24725), nor in Finance Docket No. 21755, did plaintiffs file a petition before the Commission seeking reconsideration with respect to the matters raised in paragraphs VI(A) and VII(A)(1) of the complaint. The filing of such a petition for reconsideration is a necessary prerequisite to plaintiffs' right to raise those matters in their complaint.

(h) Plaintiffs failed to exhaust their administrative and judicial remedies in Finance Docket No. 21755.

2. *Paragraph VII(A)(2).* In this paragraph, plaintiffs seek to challenge (a) the Commission's failure to require compliance with an order it entered on February 7, 1967 in Finance Docket No. 21755, and (b) the Commission's denial of plaintiffs' motion to require that Missouri Pacific Railroad Company be made a party in Finance Docket No. 24725.

(a) Plaintiffs may not in this case challenge the Commission's action with respect to its order of February 7, 1967 in Finance Docket No. 21755 for the reasons stated in Part II, paragraph 1, above.

(b) Missouri Pacific Railroad Company has no involvement in the discontinuance of trains 93 and 54.

(c) The Commission's order of February 7, 1967 in Finance Docket No. 21755 contains no conditions or requirements, but merely reinstates an order entered earlier by the Commission.

3. *Paragraphs VII(B)(2), VII(B)(3), VII(B)(4), VII(B)(5) and VII(B)(6).* Section 13a(1) of the Interstate Commerce Act and the applicable rules of the Commission were fully satisfied by the notice given by Eastern.

4. *Paragraphs VII(B)(7), VII(B)(8), VII(B)(9) and VII(B)(10).* Each of trains Nos. 93 and 54 is an entire train within the meaning of Section 13a(1), and each must be considered independently of any train with which it connects.

5. *Paragraphs VII(B)(12) and VII(B)(15).*

(a) The Commission did not enter an order of continuance pursuant to Section 13a(1) prior to February 1, 1968. Accordingly, Eastern was authorized to discontinue trains Nos. 93 and 54 on that date due to the expiration of the statutory four month extension ordered by the Commission on September 18, 1967.

(b) Section 15(2) of the Interstate Commerce Act is not applicable to proceedings under Section 13a(1) of the Act.

(c) In any event, the Commission's order provides that it shall not be effective for 35 days. (331 I.C.C. at 464.)

6. *Paragraphs VII(B)(13), (14), (17), (28), (29), (32) and (37).* The allegations of said paragraphs are so vague, indefinite and uncertain that Eastern is unable to prepare a responsive pleading thereto.

7. *Appendix 2 and Appendix 3.* The documents contained therein are wholly irrelevant to any matters raised in the complaint.

III.

Motion To Dismiss Eastern as a Defendant

In the alternative, solely in the event the Court denies the foregoing motion to dismiss, Eastern moves that it be dismissed as a party defendant and granted leave to intervene as a party defendant.

The only proper defendant is the United States of America. Eastern should be dismissed as a party defendant, and granted leave to intervene as a party defendant.

Respectfully submitted,

/s/ Albert E. Jenner, Jr.

/s/ Thomas P. Sullivan

/s/ Keith F. Bode

/s/ David C. Roston

Attorneys for defendant Chicago and Eastern Illinois Railroad Company

Of Counsel:

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Patrick C. Mullen
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF CHICAGO, et al.,

Plaintiffs,

v.

Civil Action
No. 68 C 956

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

and,

CHICAGO & EASTERN ILLINOIS
RAILROAD CO.,

Defendants.

JOINT ANSWER OF THE UNITED STATES OF AMERICA
AND THE INTERSTATE COMMERCE COMMISSION

The United States of America and the Interstate Commerce Commission, defendants herein, answer the complaint as follows:

I.

Admit the allegations of paragraph I of the complaint.

II.

Answering the allegations of paragraph II A. of the complaint, admit that the parties listed in paragraphs I (1) and (3) of the complaint were parties to the proceedings before the Commission and that the Commission's report and order were issued and served on the dates alleged. Defendants respectfully refer this Court to the cited report and order for a complete and accurate statement of the findings, conclusions and order of the Commission.

Answering the allegations of paragraph II B. of the complaint, admit that the parties listed in paragraph I (2) of the complaint were not parties to the proceedings before the Commission, that hearings were not held at points located south of Evansville, that no notice of discontinuance was

posted at stations in the vicinity of Nashville, that the Governor of Tennessee was not served with notice, and that Appendices 2 and 3 are attached to the complaint. With respect to the remaining allegation of paragraph II B. of the complaint, insofar as they attempt to characterize findings of the Commission, defendants respectfully refer this Court to the assailed report and order for an accurate statement of those findings, and insofar as they are argumentative defendants aver that they require no answer. Defendants further answer that the provisions of section 13a(1) of the Interstate Commerce Act were fully complied with.

III.

Admit the allegations of paragraphs III through V, inclusive, of the complaint.

IV.

Answering the allegations of paragraph VI A. of the complaint, defendants aver that the cited Commission order has been subjected to judicial review and sustained by the courts in *Illinois Central R. Co. v. United States*, 263 F. Supp. 421 (N.D. Ill. 1966), aff'd 385 U.S. 457 (1967), and that plaintiffs' attack on that order is barred by principles of *res judicata* and collateral estoppel, and that the order is over 3½ years old and that plaintiffs' attack is further barred by laches.

Admit the allegations of paragraph VI B. of the complaint.

V.

Answering the allegations of paragraphs VII and VIII of the complaint, including each and every subparagraph thereof, defendants deny that the actions of the Commission are unlawful for any of the reasons stated or for any other reason whatsoever and aver that the assailed Commission order is valid in all respects.

WHEREFORE, defendants, the United States of America and the Interstate Commerce Commission pray that the complaint be dismissed and the relief sought be denied.

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Attorneys for the United States of America

ROBERT W. GINNANE
General Counsel

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Interstate Commerce Commission
Washington, D.C. 20423

Attorneys for the Interstate Commerce Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TENNESSEE PUBLIC SERVICE COMMISSION, CITY OF CHICAGO, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, STATE OF LOUISIANA, ALABAMA PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSION OF OHIO, RAILWAY LABOR EXECUTIVES' ASSOCIATION and UNITED TRANSPORT SERVICE EMPLOYEES (AFL-CIO),

Plaintiffs,

v. No. 68 C 1666

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Defendants.

AMENDED COMPLAINT

Plaintiffs are communities, a State, State agencies entrusted with the maintenance of adequate railroad facilities, and labor organizations which attack various findings, decision and order of the Interstate Commerce Commission ("Commission"), entered under section 13a(1) of the Interstate Commerce Act, 49 U.S.C. section 13a(1), as follows:

A. *"Hummingbird" Trains.* Plaintiff State of Louisiana is served by the "Hummingbird" passenger trains operated by defendant Louisville & Nashville Railroad Company ("L&N"). Although not directly served by the "Georgian" passenger trains, plaintiff has available "Georgian-Hummingbird" train service. Plaintiff Public Utilities Commission of Ohio is served by the "Hummingbird" passenger trains.

B. *"Georgian" Trains.* Plaintiff City of Chicago was formerly served by the "Georgian" passenger trains jointly operated by Chicago & Eastern Illinois Railroad Company ("C&EI") and L&N. Although not directly served by the

"Hummingbird" trains, City of Chicago formerly had available "Georgian-Hummingbird" train service.

C. *"Hummingbird" & "Georgian" Trains.* Plaintiffs Tennessee Public Service Commission, Alabama Public Service Commission and The Metropolitan Government of Nashville and Davidson County Tennessee are served by the "Hummingbird" trains and by the "Georgian" trains, the latter presently operating only between Evansville, Ind. and Atlanta, Ga. subsequent to the discontinuance by C&EI of its segment of the "Georgian" between Chicago, Ill. and Evansville, Ind.

D. *Labor Organization.* Plaintiff Railway Labor Executives' Association is composed of the chief executives of railway labor unions which represent most of the employees on defendant Louisville and Nashville Railroad Company. Plaintiff United Transport Service Employees (AFL-CIO) represents the coach attendants on the "Hummingbird".

II.

All of the plaintiffs except United Transport Service Employees (AFL-CIO) were parties to proceedings before the Interstate Commerce Commission known as Finance Docket No. 25047, *Louisville and Nashville Railroad Company Discontinuance of Trans Nos. 6 and 7 Between New Orleans, La., and Cincinnati, Ohio.* The decision of the Commission, Division 3, dated September 3 and served September 6, 1968 is attached hereto as Appendix 1.

The plaintiffs listed in I.B. and I.C. (except plaintiff Public Utilities Commission of Ohio) are also plaintiffs or intervening plaintiffs in No. 68 C 956, *City of Chicago v. United States,* an action seeking to set aside orders of the Commission authorizing the discontinuance by C&EI of its segment of the "Georgian" trains in Finance Docket No. 24725, *Chicago & E.I.R. Co. Discontinuance–Chicago & Evansville,* 331 I.C.C. 447 (1/25/68), aff'd on reconsid. May 8, 1968.

III.

This action is brought under, and the United States is made a defendant under, and the jurisdiction of this court is conferred by, Title 28 of the United States Code, Sections 1336(a), 1398(a), 1651, 2321-25, inclusive, and 2284; Interstate Commerce Act (49 U.S.C. section 1 et seq., and particularly sections 13a(1) and 17(9); the Fifth Amendment to the Constitution of the United States; and the Administrative Procedure Act, 5 U.S.C. sections 702-5, inclusive.

IV.

The venue of this action is in this Court, pursuant to the provisions of 28 U.S.C. 1398(a), referred to above, because plaintiff City of Chicago is located within the jurisdiction of this Court.

V.

Defendant United States of America is a statutory defendant which is named as a party pursuant to 28 U.S.C. 2322. Defendant Interstate Commerce Commission is an administrative agency, created by the Act to Regulate Commerce, Approved February 4, 1887, 24 Stat. 283, and amendments thereto, now known as the Interstate Commerce Act, with specifically vested powers and duties respecting transportation in interstate and foreign commerce.

Defendant Louisville & Nashville Railroad Company is a railroad corporation with its principal office at Louisville, Ky. and which is doing business in the Northern District of Illinois with offices at 105 W. Adams Street in the City of Chicago.

VI.

This action seeks to enjoin, annul, suspend and set aside the findings, decision and order of the Interstate Commerce Commission, Division 3, dated September 3 and served September 6, 1968 in Finance Docket No. 25047, *Louisville and Nashville Railroad Company Discontinuance of Trains*

Nos. 6 and 7 Between New Orleans, La., and Cincinnati, Ohio, and in aid of such judicial review, and as a part thereof as well as independently, to require that L&N not discontinue its passenger trains Nos. 6 and 7.

VII.

The findings, decision and order of the Commission, set forth in Paragraph VI, above, are erroneous, unsupported by substantial evidence, without rational basis, lack the necessary findings, and are violative of due process, on the following grounds, among others:

(a) Erroneously failed to adopt the request of plaintiffs City of Chicago and The Metropolitan Government of Nashville and Davidson County Tennessee, that the Commission seek to restrain the discontinuance of the "Hummingbird" trains pending judicial review of C&EI's discontinuance of its segment of the "Georgian" trains. (F.D. 25047, *Report,* pp. 12-13).

(b) Erroneously assumed that this Court will not decide No. 68 C 956 for "perhaps longer than a year." (F.D. 25047, *Report,* p. 13).

(c) Erroneously failed to render a positive determination, or to hold further hearings to enable it to determine, whether a ruling favorable to plaintiffs in No. 68 C 956 would result in an order requiring continuance of the "Hummingbird" trains, rather than rendition of the inconclusive finding that a favorable ruling in No. 68 C 956 "might or might not change the picture." (F.D. 25047, *Report,* p. 13).

(d) Erroneously adopted the carrier's estimate that it incurred a loss of $505,361 for the year 1967 in operating the "Hummingbird" trains without considering and evaluating the carrier's explanation on brief that the abnormal data for 1967 was caused by inflation and because the expense of handling added equipment on train No. 7 formerly handled on train No. 37, was greater than the added revenue to No. 7 from Train No. 37. (F.D. 25047, *Report,* p. 7; L&N *Brief,* pp. 4-5).

(e) Erroneously gave consideration to the expense of handling equipment from former train No. 37 since such expense and alteration of schedules was fully evaluated and credited in a prior proceeding. *Atlanta & W.P.R. Co. Discontinuance of Trains,* 330 I.C.C. 133, 135-36 (1966).

(f) Erroneously failed to evaluate and make the requisite findings based upon the 10 percent passenger fare increase granted in 1968 which will materially increase L&N revenues for the "Hummingbird" trains, and greatly reduce the asserted loss for 1967.

(g) Erroneously found that "Georgian-Hummingbird" train service consists of C&EI trains Nos. 93 and 54 at Evansville, Ind., L&N trains Nos. 5 and 10 between Evansville, Ind. and Nashville, Tenn., and connecting L&N trains Nos. 6 and 7, whereas the connecting service between Evansville, Ind. and Nashville, Tenn. was found to be trains Nos. 93 and 54 (331 I.C.C. 447, 450 and 331 I.C.C. 203,204, Appendix 1 and Appendix 6 to Complaint in No. 68 C 956) and L&N trains 5 and 10 operate between St. Louis, Mo. and Evansville, Ind.

(h) Erroneously found that former sources of traffic and revenue are unalterably foreclosed in view of the pending litigation before this court which the report itself acknowledges. (F.D. 25047, *Report,* p. 15 and p. 12)

(i) Erroneously relied upon "on" and "off" data which were incorrectly computed for various cities. (F.D. 25047, *Report,* p. 5)

(j) Erroneously failed to render subsidiary finding as to the impact of the discontinuance upon railway labor.

(k) Erroneously erred as a matter of law in finding that the Commission is without authority to impose employee protective conditions under 49 U.S.C. 13a(1). (F.D. 25047, *Report,* p. 16)

(l) Erroneously considered a proposed schedule change by the Atlanta and West Point Railroad between Atlanta, Ga. and Montgomery, Ala. which was not made the subject

of a section 13a(1) notice invoking federal jurisdiction. (F.D. 25037, *Report*, pp. 6-7)

(m) Erroneously failed to consider and render the requisite finding that L&N's overall passenger deficit for its system is very small, whereas its system profit is one of the highest in the Nation. (F.D. 25047, *Report*, p. 6)

(n) Erroneously found that continued operation of the "Hummingbird" trains is not required by public convenience and necessity and that continued operation would unduly burden interstate commerce.

VIII.

The deficiencies in the findings, decision and order of the Commission, Division 3, specified in Paragraphs VI and VII, among others, if not enjoined, annulled, suspended and set aside, would operate to the substantial damage and irreparable injury of plaintiffs, and these plaintiffs are without an adequate remedy at law.

IX.

WHEREFORE, plaintiffs respectfully pray:

1. That in accordance with 28 U.S.C. 2284(3) and 1651 and 5 U.S.C. 705, the decision and action of the Interstate Commerce Commission complained of in this suit be temporarily restrained and stayed from taking effect until hearing and determination by a three-judge court.

2. That a court constituted as required by 28 U.S.C. 2284 and 2321-2325, consisting of three judges, of whom at least one shall be a circuit judge, be convened, and that said Court so constituted and convened shall hear and determine this suit.

3. That the court of three judges issue an interlocutory injunction staying and suspending the operation of said decision and action authorized by the Interstate Commerce Commission pending final hearing and determination of this suit.

4. That the court of three judges, upon final hearing of this suit enter a decree permanently suspending, enjoining, setting aside and annulling the said orders of the Interstate Commerce Commission, in whole or in part, as complained of herein.

5. That plaintiffs have such other and further relief in the premises as to the court may seem required by equity and as may be deemed fit and proper.

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Attorneys for Plaintiffs

Dated at
Chicago, Ill.
September 12, 1968

CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of September 1968 served a copy of the foregoing amended complaint upon counsel for all parties of record in this action as well as in No. 68 C 956, *City of Chicago v. United States*, by first-class mail postage prepaid.

Chicago, Ill. BERNARD RANE

VERIFICATION

STATE OF ILLINOIS
COUNTY OF COOK ss:

BERNARD RANE being duly sworn deposes and says that he is Assistant Corporation Counsel for the City of Chicago; that the plaintiffs herein are united in interest and pleading together; and that he has read the foregoing complaint and the same is true to his own knowledge except as to the matters alleged upon information and belief and as to those matters he believes them to be true.

Sworn to before me this
12th day of September, 1968

/s/ Beranrd Rane

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TENNESSEE PUBLIC SERVICE COMMISSION, et al.,

Plaintiffs,

v.

No. 68 C 1666

UNITED STATES OF AMERICA, et al.,

Defendants.

MOTION OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY, DEFENDANT, TO DISMISS THE COMPLAINT

Now comes the Louisville and Nashville Railroad Company, defendant, (L&N), and respectfully moves the Court to dismiss the complaint herein for the following reasons:

1. The City of Chicago has no standing to bring the complaint and so venue does not lie in this Court.

2. The report and order of the Interstate Commerce Commission involved in this case is not subject to judicial review.

Respectfully submitted,

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JAMES W. HOELAND
C. T. COOMES
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Attorneys for Louisville and Nashville Railroad Company

908 West Broadway
Louisville, Kentucky 40201

September 11, 1968.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL.,
Plaintiffs,
v.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Defendants.

Civil Action
No. 68 C 1666

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

The United States of America and the Interstate Commerce Commission, defendants herein, answer the amended complaint as follows:

I.

Admit the allegations of paragraphs I through VI, inclusive, of the amended complaint.

II.

Answering the allegations of paragraphs VII and VIII of the amended complaint, defendants deny that the actions of the Commission are unlawful for any of the reasons stated or for any other reason whatsoever and aver that the assailed Commission order is valid in all respects.

WHEREFORE, defendants, the United States of America and the Interstate Commerce Commission pray that the

amended complaint be dismissed and the relief sought be denied.

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Assistant Attorney General

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Attorneys for the United States of America

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Interstate Commerce Commission
Washington, D.C. 20423

Attorneys for the Interstate Commerce Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL.,
Plaintiffs,

v.

No. 68 C 1666

UNITED STATES OF AMERICA, ET AL.,
Defendants.

AMENDED ANSWER OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY, DEFENDANT

Louisville and Nashville Railroad Company, defendant, (L&N), answers the complaint in this proceeding as follows:

I.

Defendant admits that plaintiffs are communities, a state, state agencies and labor organizations. Defendant denies that any plaintiff is entrusted with the maintenance of adequate railroad facilities, such authority, insofar as is pertinent to this proceeding, being within the exclusive jurisdiction of the Interstate Commerce Commission.

A. Defendant denies that the Hummingbird (hereinafter referred to as L&N trains Nos. 6 and 7) serves the State of Louisiana, since they only serve the City of New Orleans. Defendant also denies that plaintiff State of Louisiana has available "Georgian-Hummingbird" train service, as the Chicago & Eastern Illinois Railroad Company has discontinued its trains Nos. 54 and 93 (the Georgian) between Chicago and Evansville.

B. Defendant admits that prior to the discontinuance by the Chicago & Eastern Illinois Railroad Company of its trains Nos. 54 and 93, referred to in the complaint as the "Georgian," passenger service was available between Chicago, on the one hand, and other points via said C&EI trains Nos. 54 and 93, thence via L&N trains Nos. 3 and 4 and thence via L&N trains Nos. 6 and 7.

C. Defendant denies that L&N trains Nos. 6 and 7 serve any plaintiffs.

D. Defendant admits the allegations of subparagraph D.

II.

Defendant admits the allegations of Paragraph II.

III.

Defendant denies that this Court has jurisdiction of the action.

IV.

Defendant denies that venue lies in this Court, because no party, having standing to bring it, resides or has its principal place of business in the judicial district.

V.

Defendant admits the allegation of Paragraph V.

VI.

Defendant denies that the Court has jurisdiction in the premises.

VII.

Defendant denies the allegations in Paragraph VII.

VIII.

Defendant denies the allegations in Paragraph VIII.

IX.

Defendant denies the allegations in Paragraph IX.

FURTHER ANSWERING, Defendant denies that the report and order of the Interstate Commerce Commission are unlawful or otherwise improper for any of the reasons alleged in the complaint.

WHEREFORE, Louisville and Nashville Railroad Company prays that the relief sought, both interlocutory and permanent, be denied and that the complaint be dismissed.

Respectfully submitted,

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Attorneys for Louisville and Nashville Railroad Company.

October 19, 1968.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOCKETED

Name of Presiding Judge, Honorable EDWIN A. ROBSON

Cause No. 68 C 1666 Date SEPT. 6, 1968

Title of Cause TENNESSEE PUBLIC SERVICE COMMISSION, ET AL
V.S.A. et al

Brief Statement of Motion (1) Motion for Temporary Restraining Order
(2) Motion to Consolidate With No. 68 C 956

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel BERNARD RAZE, 511 CITY HALL BLDG., CHICAGO
MARK GOLDSTEIN, 511 " " " "

Representing PLAINTIFFS

Names and Addresses of other counsel entitled to notice and names of parties they represent. See attached list

Enter temporary restraining

Reserve space below for notations by minute clerk

Order motion for temporary injunction and motion for consolidation with 68 C 956, City of Chicago, et al v. U.S.A., et al entered and set for hearing before Judge Perry on Sept. 12, 1968 at 10:15 A.M.

Robson

[illegible] to the Clerk.
[illegible] to address the Court until motion has been ruled.

10 15 AM

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOCKETED
SEP 17 1968

Name of Presiding Judge, Honorable Sam J. Perry

Case No. 68 C 1666 Date

Title of Cause Tennessee Public Service Commission et al
vs
UNITED STATES OF AMERICA

Brief Statement of Motion Hearing on motion for temporary injunction and motion for consolidation

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and addresses of appearing counsel with 68 C 956

Representing

Names and addresses of other counsel entitled to notice and names of parties they represent.

Evd heard & arguments concluded. Ord. alt. Mo of Eight L & N. R.R. Co. to dissolve restr. order or to require pltfs post bond, denied.

Mo of pltfs for extension of temp. restr. order entered 9-6-68, granted & said order to remain in effect until further order of Court. Mo L & N R.R. Co. to dismiss complt. & mo of pltfs for consolidation of this prelim. hrg. with cause 68 C 956 and Eastern unconstitutionality Order pltfs given 6 days to file answ. to deft's mo of this day filed & deft's given 6 days to file reply thereto. Ca. cont. under advisement under rule 13

Reserve space below for notations by minute clerk

Send this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called. (Pltf).

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Judge Sam Perry

Cause No. 69 C. 1666 Date 11/9/65

Title of Cause Tennessee Public Service Commission v. U S A et al

Brief Statement of Motion Motion for Stay of Court Order of 11/8/69 dissolving Temporary Restraining Order in entitled cause and Order th

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel R. T. Lewis - Corp Counsel - City Hall Rm 511 - City Hall

Representing City of Chicago

Names and Addresses of other counsel entitled to notice and names of parties they represent. H. R. Begley - 39 S. Clark - U.S. Atty & Asst Harding - Fed. Bldg

Court entertained this motion & has been informed that Judge Robson is in Washington D.C. on a multiple litigation hearing & the Court has also been informed that Judge Kaufman is also not available therefore, as one of the 3 Judges has the motion is denied for want of jurisdiction of one of the three judges to stay the execution of a three judge Court order

Reserve space below for notations by minute clerk

J. S. Perry

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

Supreme Court of the United States

1364
Nos. 1363 and 4, October Term, 19 68

City of Chicago, et al.,

Appellants,

v.

United States, et al.

APPEALS from the United States District Court for the Northern District of Illinois.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument.

June 16, 1969

FILE COPY

MAY 5 19

JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 101

CITY OF CHICAGO, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal From the United States District Court for the Northern District of Illinois

JURISDICTIONAL STATEMENT

(See counsel on page 2 of cover)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

CITY OF CHICAGO, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal From the United States District Court for the Northern District of Illinois

---

JURISDICTIONAL STATEMENT

City of Chicago, The Metropolitan Government of Nashville and Davidson County, Tennessee, Village of Milford, City of Watseka, City of Hoopeston, City of Danville, City of Terre Haute, City of Vincennes, City of Henderson, Maurice F. Radrizzi, National Association of Railroad Passengers, Indiana Public Service Commission, Georgia Public Service Commission, Tennessee Public Service Commission, Alabama Pub-

lic Service Commission, Mississippi Public Service Commission and Kentucky Railroad Commission, appeal from the order of the United States District Court for the Northern District of Illinois-Eastern Division, entered January 8, 1969, dismissing their complaint seeking to set aside and to annul findings, decisions and orders of the Interstate Commerce Commission (Commission), relating to the discontinuance by Chicago and Eastern Illinois Railroad Company (C&EI) of its segment of the "Georgian" passenger train between Chicago, Ill. and Evansville, Ind. (287 miles).

The court below dismissed plaintiffs' complaint on the sole ground that an action may not be brought to review any decision or order of the Commission allowing a passenger train discontinuance pursuant to section 13a(1) of the Interstate Commerce Act, 49 U.S.C. § 13a(1).

OPINIONS BELOW

The opinion of the three-judge court for the Northern District of Illinois was entered January 8, 1969, and is reported at *City of Chicago* v. *United States*, 294 F. Supp. 1103. The opinion and order are set forth herein as Appendix B. The case below was heard jointly with *Tennessee Public Service Commission* v. *United States*, 294 F. Supp. 1106.

The report and order of the Interstate Commerce Commission, Division 3, dated January 25 and served January 31, 1968, were entered in its Finance Docket No. 24725, *Chicago & E.I.R. Co. Discontinuance-Chicago & Evansville*, and are reported at 331 I.C.C. 447. The report and order are set forth herein as Appendix C.

The order of the Interstate Commerce Commission, Division 3, upon reconsideration was entered May 8 and served May 15, 1968 at 9:30 A.M., and is set forth herein as Appendix D. The corrected order upon reconsideration, entered May 8 and served May 15, 1968 at 3 P.M., is set forth herein as Appendix E.

JURISDICTION

This suit was brought May 27, 1968 in the three-judge court pursuant to 28 U.S.C. § 1336(a), 1398(a), 2284, 2321-25, 5 U.S.C. § 702, and 49 U.S.C. § 17(9), to annul and to set aside findings, decisions and orders of the Interstate Commerce Commission entered under 49 U.S.C. § 13a(1), dated January 25 and May 8, 1968.

The order and opinion of the district court dismissing the complaint were entered January 8, 1969.

Notice of appeal was filed in the district court for the Northern District of Illinois-Eastern Division on March 6, 1969.

Jurisdiction of the Supreme Court to review this order by direct appeal is conferred by 28 U.S.C. § 1253 and § 2101(b). Jurisdiction specifically for interstate passenger trains under 49 U.S.C. § 13a(1) is sustained by *City of Williamsport* v. *United States*, 273 F. Supp. 899 (M.D. Pa. 1967), 282 F. Supp. 46 (M.D. Pa. 1968), aff'd *per curiam* 392 U.S. 642 (1968).

STATUTES INVOLVED

The statutes involved in this case are section 13a(1) of the Interstate Commerce Act, 49 U.S.C. § 13a(1), enacted August 12, 1958, 72 Stat. 571, and 28 U.S.C. § 1336(a), and are set forth in Appendix A herein.

QUESTION PRESENTED

Do the U.S. District Courts possess jurisdiction to review decisions and orders of the Interstate Commerce Commission, entered under 49 U.S.C. § 13a(1) after hearing and investigation, where the Commission has found that an interstate passenger train, or a part thereof, is not required by the public convenience and necessity and that continued operation thereof would unduly burden interstate or foreign commerce?

STATEMENT

This appeal involves the "Georgian" passenger train. The companion appeal involves the "Hummingbird" passenger train. The two trains interconnect at Nashville, Tenn., and are together advertised and commonly known as the "Georgian-Hummingbird" train service.

The "Georgian" runs between Chicago, Ill. and Atlanta, Ga. It is operated by C&EI between Chicago, Ill. and Evansville, Ind., and by Louisville & Nashville Railroad Company (L&N) between Evansville, Ind. and Atlanta, Ga. The "Hummingbird" operates between Cincinnati, Ohio and New Orleans, La. Passengers are interchanged between the "Georgian" and the "Hummingbird" at Nashville, Tenn.

Commission Proceedings

C&EI filed a notice with the Commission on August 31, 1967 that it would, effective October 1, 1967, discontinue its trains Nos. 93 and 54 between Chicago, Ill. and Evansville, Ind.[1] The Commission on Sep-

[1] L&N's segment of the trains is likewise numbered Nos. 93 and 54. (App. C, p. 12a)

tember 18, 1967 entered upon an investigation into the proposed discontinuance, and ordered continued operation pending hearing and decision in its investigation.

After hearings in Illinois and Indiana, Division 3 of the Commission on January 25, 1968 entered its report, served January 31, finding that the operation by C&EI of its passenger trains Nos. 93 and 54 between Chicago, Ill. and Evansville, Ind. is not required by the public convenience and necessity, and that continued operation thereof would unduly burden interstate and foreign commerce. (App. C, p. 28a). The C&EI segment of the "Georgian" was discontinued on February 1, 1968. The "Georgian" today originates at Evansville, Ind. and terminates at Atlanta, Ga.

Certain protestants to the agency proceeding petitioned for reconsideration, contending that the carrier had not effectively invoked the jurisdiction of the Interstate Commerce Commission. The Commission, Division 3, upon reconsideration initially ruled in protestants' favor by dismissing the entire proceeding for failure of C&EI to effectively invoke the Commission's jurisdiction. (App. D, pp. 32a-33a). However, the order on reconsideration, issued May 15, 1968 at 9:30 A.M., was replaced by a corrected order served 3:00 P.M. the same day which denied reconsideration in all respects. (App. E, pp. 34a-35a).

During the pendency of the reconsideration proceedings, L&N on April 3, 1968 filed, served and posted notice that it would, effective May 7, 1968, discontinue the "Hummingbird" over its entire run between Cincinnati, Ohio and New Orleans, La. L&N informed the Commission, simultaneously with the filing of its notice proposing to terminate the "Hummingbird", that the

discontinuance of C&EI's segment of the "Georgian" resulted in the immediate loss of the bulk of the passenger business handled on the connecting "Hummingbird".

Court Proceedings

Plaintiffs [2] on May 27, 1968 commenced their action to review the partial discontinuance of the "Georgian" passenger train. The defendant railroad moved to dismiss the action for lack of subject-matter jurisdiction in the court. Plaintiffs moved for summary judgment in their favor for lack of jurisdiction in the Commission, basically for the reasons outlined by the Commission in its first order on reconsideration served May 15, 1968.

While these motions were pending, the Commission, Division 3, entered its decision in the "Hummingbird" case, dated September 3 and served September 6, 1968, permitting these trains to be discontinued. *Louisville & N.R. Co. Discontinuance of Trains*, 333 I.C.C. 720. Upon the service date certain of the appellants herein,[3]

---

[2] The original plaintiffs were City of Chicago, Metropolitan Government of Nashville and Davidson County, Tennessee, Village of Milford, City of Watseka, City of Hoopeston, City of Danville, City of Terre Haute, City of Vincennes, Maurice F. Radrizzi (Brotherhood of Railroad Trainmen). Intervening plaintiffs were Georgia Public Service Commission, Tennessee Public Service Commission, National Association of Railroad Passengers, Alabama Public Service Commission, City of Evansville, Indiana Public Service Commission, City of Henderson, Kentucky Railroad Commission, and Mississippi Public Service Commission.

[3] City of Chicago, Tennessee Public Service Commission, Metropolitan Government of Nashville and Davidson County, Tennessee, and Alabama Public Service Commission.

and other plaintiffs,[4] commenced an action that day in the court below to review the decision permitting discontinuance of the "Hummingbird" trains, and requested issuance of a temporary restraining order preventing discontinuance until their case could be heard. Other plaintiffs intervened.[5] Defendants United States and Commission did not oppose entry of the restraining order, and it was granted. The Commission, by Division 3, acting as an Appellate Division, on October 31, 1968 denied petitions for reconsideration of the "Hummingbird" decision.

The court below dismissed both actions on January 8, 1969. In both cases the court held that it was without power under the Judicial Code to review decisions and orders of the Commission, rendered after hearing and investigation, allowing a passenger train discontinuance, because "it seems apparent that Congress intended to deny judicial review in the instant case". (App. B, p. 7a). However, the court below acknowledged the right of judicial review at the suit of the railroads if the Commission's decision is adverse to the carriers. (App. B, p. 6a).

The "Hummingbird" was discontinued in the morning of January 9, 1969, in mid-run at Birmingham, Ala.[6] Application for Stay filed later that day with Mr. Justice Marshall was denied on January 13, 1969.

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[4] State of Louisiana, Public Utilities Commission of Ohio, Railway Labor Executives' Association and United Transport Service Employees (AFL-CIO).

[5] Kentucky Railroad Commission and Mississippi Public Service Commission.

[6] Washington Post, "Noted Train Quits, Bus Takes Over," January 11, 1969.

THE QUESTION IS SUBSTANTIAL

There is a clear split between district courts as to whether the public has the right of judicial review in train-off cases. All courts agree that the railroads do have the right of judicial review if the agency decision is adverse to the carrier. This appeal has been taken to finally establish that the public has the same right as a railroad to seek judicial review of final agency decisions affecting railroad passenger service.

Two early district court decisions had ruled against the right of a State to seek judicial review. *State of Minnesota* v. *United States,* 238 F. Supp. 107 (D. Minn. 1965); *State of New Hampshire* v. *United States,* 251 F. Supp. 421 (D. N.H. 1965). Two subsequent opinions by three-judge courts in the District of Vermont and the Middle District of Pennsylvania rejected the reasoning of *State of Minnesota* and *State of New Hampshire,* and held that judicial review does exist where the Commission enters upon an investigation under section 13a(1), compiles a record, and issues a report with its findings. *State of Vermont* v. *Boston & Maine Corp.,* 269 F. Supp. 80 (D. Vt. 1967); *City of Williamsport* v. *United States,* 273 F. Supp. 899 (M.D. Pa. 1967), 282 F. Supp. 46 (M.D. Pa. 1968), aff'd *per curiam* 392 U.S. 642 (1968). A third court assumed jurisdiction without discussion. *People of State of California* v. *United States,* 258 F. Supp. 950 (N.D. Calif. 1966).

The opinion of the court below, denying the right to judicial review, is the first reported decision on the point since this Court's decision last term in *City of Williamsport, supra.* However, a different three-judge panel, in the very court below, with knowledge of the

decision of its brethren now under appeal, on February 14, 1969 denied motions by railroads to dismiss for lack of jurisdiction, thus creating a conflict within the same judicial district.[7] A three-judge district court for the Northern District of New York, in its opinion rendered March 4, 1969, upheld the right of the State of New York to seek judicial review. *State of New York* v. *United States,* F. Supp. (N.D.N.Y. 1969).[8] A three-judge court for the District of Wyoming on February 27, 1969 continued a temporary restraining order barring a train discontinuance, and has set the agency decision for full judicial review.[9]

Mr. Justice Harlan, acting as a Circuit Justice, has suggested that substantial issues are involved in this area. *Public Service Board of State of Vermont* v. *United States,* 87 S. Ct. 3, 4 (1966).

The present conflict among the district courts on jurisdiction to review is creating considerable confusion, and is an invitation to venue-shopping. Plaintiffs seeking review of a passenger train discontinuance will stay clear of the District of Minnesota and the District of New Hampshire. On the other hand, they may bring their actions in the District of Vermont, the Middle District of Pennsylvania, the Northern Dis-

---

[7] *City of Chicago* v. *United States,* No. 68 C 2184, Swygert, C.J., Hoffman and Marovitz, D.J.J. Undergoing review is *Illinois Central R. Co. Change in Service,* 333 I.C.C. 853 (1968). Final hearing on the merits has been set for May 23, 1969.

[8] Now on appeal in this Court. No. —, October Term, 1968, *State of New York* v. *United States.*

[9] *City of Sheridan* v. *United States,* No. 5316-Civil, Hickey, C.J., Chilson and Kerr, D.J.J. Undergoing review is *Chicago, B. & Q.R. Co.—Discontinuance of Trains,* 334 I.C.C. 210 (1969). Final hearing on the merits has been set for June 9, 1969.

trict of New York, and apparently also in the District of Wyoming. A hopeless split of authority exists in the Northern District of Illinois; jurisdiction to review in that court depends upon the judges to whom the case may be assigned.

Passenger train proceedings brought before the Commission involve multi-state train operations. These cases typically draw the intervention of numerous protestants, such as States, communities, civic groups and labor organizations. Under the special venue statute governing judicial review of Commission decisions, noted last term,[10] any of these parties may institute an action where it resides or has its principal office. 28 U.S.C. § 1398(a). The present split between the lower courts on the jurisdictional question, with the wide opportunity for a selection of forum, strongly suggests that the issue be resolved promptly.

ARGUMENT

The court below recognized the unfairness of allowing the railroads to seek review of Commission decisions adverse to them, but denying States and communities a similar right when they lose at the agency level. (App. B, p. 6a) The court below placed principal reliance upon *State of Minnesota, supra.* It concluded that an action will not lie to review a train discontinuance, even though the Commission had initially entered upon an investigation into the proposed discontinuance, served an order upon the carrier requiring continued operation pending hearing and decision in its investigation and, finally, four months later issued a detailed report based upon an evidentiary

[10] *Penn-Central Merger Cases,* 389 U.S. 486, 505, 544-45 (1968).

record finding that the trains should be discontinued. The court reasoned that since the order entered at the conclusion of the investigation is in the form of an order discontinuing the investigation, it is not an appealable "order" within the meaning of 28 U.S.C. § 1336. (App. B, p. 7a) On the other hand, if the railroad has been denied the right to terminate the trains, the railroad would have the right of redress in the courts since an "order" would be entered requiring continued operation. (App. B, pp. 6a-7a) Moreover, the court relied upon *State of Minnesota, supra,* to find no logical difference between the instant proceeding and situations where the Commission, in its discretion, had declined to institute any investigation whatsoever. Two such situations were *State of New Jersey* v. *United States,* 168 F. Supp. 324 (D. N.J. 1958), aff'd *per curiam* 359 U.S. 27 (1959) and *Sludden* v. *United States,* 211 F. Supp. 150 (M.D. Pa. 1962).[11]

Contrary to the opinion of the court below, judicial review of final agency action is available except to the extent that statutes preclude judicial review. 5 U.S.C. § 701. An "order" is defined in the Administrative Procedure Act as the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form. 5 U.S.C. § 551. In holding that an "order" is involved where a railroad seeks to set aside an agency decision requiring continued operation

[11] The opinion below incorrectly states, "It has been conceded by both sides that when the Commission decides not to enter into an investigation, there is no judicial review." (App. B, p. 4a). No such concession was made by plaintiffs below; rather, the railroads and the Government hold to this position. The point would seem irrelevant in any event, since here the Commission did enter upon an investigation, held hearings, and issued a 17-page printed report containing its findings and conclusions.

of a passenger train, but that an "order" is not involved where States and communities seek to set aside the final decision allowing discontinuance of the train service, the court below has resurrected the long-discarded "negative order" doctrine. Mr. Justice Frankfurter stated for the Court in *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 143:

> We conclude, therefore, that any distinction, as such, between "negative" and "affirmative" orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding.

It is now settled that Congress will not be presumed to cutoff judicial review of final agency action unless there is a persuasive reason to believe that such was the purpose of Congress. Recently the Court held in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140 (1967):

> . . . a survey of our cases shows that judicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.

It is patently unfair to allow judicial review for the railroads, but to deny access to the courts by States and communities. There is nothing in the legislative history of Transportation Act of 1958 to suggest such a result.[12] The Congress was indeed concerned with

---

[12] See: Hearings on S. Res. 284, *Passenger Train Discontinuances,* Surface Transportation Subcommittee of the Committee on Commerce, 89th Cong., 2d Sess. (1966). The general opinion of the members of the subcommittee was that section 13a(1) was not intended to prohibit court review.

alleged delays by State regulatory bodies in processing discontinuance applications, and Congress imposed a four-month limitation upon the Commission within which to decide a train-off case. But there is no showing of any complaint against the State judiciary in the transference from State regulation to federal regulation. There is thus no presumption that Congress intended to deny traditional judicial remedies for unlawful agency action. Judicial review is the technique by which administrative agencies keep within the guidelines set by Congress. Congressional impatience with State regulatory commissions, and a desire to assist the railroad industry, are insufficient grounds to infer an intent to deny judicial review for States and communities while granting judicial review for the railroads.

The reliance of the court below upon *State of New Jersey, supra,* is misplaced, since that case involved only whether the decision of the Commission not to enter upon an investigation, under the facts present in that case, is committed exclusively to agency discretion. There are many situations in administrative law where the failure of an agency to enter upon an investigation when requested to do so may not be reviewable, whereas the decisions and findings entered after investigation and hearing are subject to judicial review. This is the situation where the Commission fails to enter upon an investigation or to suspend reduced freight rates, a matter committed wholly to agency discretion. *Arrow Transp. Co.* v. *Southern R. Co.,* 372 U.S. 658 (1963). The same freight rates are subject to judicial review upon completion of the investigation or after a formal complaint is dismissed. The same rates involved in *Arrow, supra,* were later litigated in *Cincinnati New*

Orleans & Texas Pac. R. Co. v. *United States*, 229 F. Supp. 572 (S.D. Ohio 1964), modified sub nom. *Arrow Co.* v. *Cincinnati, N.O. & T.P.R.*, 379 U.S. 642 (1965).

The court below erred in assuming that the *per curiam* affirmance last term in *City of Williamsport, supra,* did not confirm the right to judicial review. The district court for the Middle District of Pennsylvania rejected the reasoning of *State of Minnesota, supra* and *State of New Hampshire, supra,* and held that jurisdiction to review does exist. 273 F. Supp. at 901-3. Later, on the merits, the district court upheld the Commission's findings allowing part of the train to be discontinued. 282 F. Supp. 46. Although the second *City of Williamsport* opinion did not again discuss the jurisdictional contentions, it did make reference to its prior opinion by way of a footnote. 282 F. Supp. at 47, fn. 2. In this Court, the jurisdictional statement presented in *City of Williamsport* set forth the conflict between district courts. The fact that appellees in *City of Williamsport* did not challenge jurisdiction would seem entitled to little weight. Jurisdiction is regulated by Congress, not by the parties. *American Fire & Cas. Co.* v. *Finn,* 341 U.S. 6, 17-18 (1951); *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 305-6 (1962).

The opinion of the court below has revived confusion, and has rendered uncertain that which seemed certain only a short while ago.

CONCLUSION

Probable jurisdiction should be noted and the judgment below reversed. Cf. *United States* v. *Dixie Express,* 389 U.S. 409 (1967).

Respectfully submitted,

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May 1969

APPENDIX A

Interstate Commerce Act. Title 49, United States Code:

Section 13a(1).

A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four

months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

Judicial Code, Title 28, United States Code:

Section 1336(a).

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 68 C 956

CITY OF CHICAGO, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, VILLAGE OF MILFORD, CITY OF WATSEKA, CITY OF HOOPESTON, CITY OF DANVILLE, CITY OF TERRE HAUTE, CITY OF VINCENNES and MAURICE F. RADRIZZI, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, *Defendants*.

Memorandum and Order

Before Knoch, Senior Circuit Judge, and Robson and Perry, District Judges.

Robson, District Judge:

This is a suit to review certain findings and conclusions of the Interstate Commerce Commission. The defendant railroad has moved to dismiss. This court is of the opinion that the motion should be granted.

On August 31, 1967, the Chicago & Eastern Illinois Railroad Company ("Eastern") gave notice under 49 U.S.C. § 13a(1) that, effective October 1, 1967, its trains numbered 93 and 54 between Chicago, Illinois, and Evansville, Indiana, would be discontinued. On September 18, 1967, the Interstate Commerce Commission ("Commission") entered an order requiring Eastern to continue operating trains 93 and 54 pending an investigation by the Commission. After hearings and briefs, Division 3 of the Commission on January 25, 1968 (served January 31, 1968),

decided to terminate its investigation, and filed a report outlining its reasons. A petition for reconsideration was denied on May 8, 1968. This suit was filed shortly thereafter. A three-judge court was convened and a joint hearing (with *Tennessee Public Service Comm.* v. *United States*, 68 C 1666) was held on November 4, 1968.

The statute under which Eastern posted its notices to discontinuance is a unique statute passed in 1958 to deal with serious financial problems faced by this nation's railroads. It allows the railroads to discontinue certain interstate trains without seeking prior approval of the Interstate Commerce Commission or any state commissions. If the Commission does nothing to stop the railroad, the discontinuance follows automatically by statute, with no need whatsoever for a Commission order to authorize the discontinuance. 49 U.S.C. § 13a(1). The Commission has a short period (30 days) in which to decide whether an investigation is necessary, and, after an investigation (if, of course, the Commission determines it is necessary), the Commission may order the continuance of part or all of the trains involved. This period of continuance is restricted to only one year, after which time the railroad may post further notices and go through the entire process again.

It has been conceded by both sides that when the Commission decides not to enter into an investigation, there is no judicial review, even though there may be cities and states which might be "aggrieved" by the discontinuances. *State of New Jersey* v. *United States*, 168 F.Supp. 324 (D. N.J. 1958), *affirmed per curiam* 359 U.S. 27 (1959); *Sludden* v. *United States*, 211 F. Supp. 150 (M.D.Pa. 1962). In the *New Jersey* case, *supra*, at 329, the court said that the Commission's order foreclosing an investigation was

> "nothing other than an announcement that the Commission intended to take no action with respect to the railroad's notice of intention to discontinue the ferries. Section 13a(1) clearly leaves to the absolute discretion of the Commission the determination of whether or not

> it . . . shall make any investigation of the matter or avail itself of its temporary veto power by way of suspension within the limitations of the Act."

The instant case, contend the plaintiffs, has a crucially different element: The Commission here entered into an investigation, held hearings, made findings, and issued an order terminating the investigation. Even though the plaintiffs concede, as they must, that the statute [§ 13a(1)] was the source for the authority to discontinue, and not any order or action of the Commission, they argue that judicial review exists as to the order terminating the investigation under 28 U.S.C. § 1336, which provides for review of Commission "orders". The question whether such a Commission order does fall under § 1336 has been discussed at length in several prior decisions.

In *State of Minnesota* v. *United States,* 238 F.Supp. 107, 112 (D.Minn. 1965), the Court determined that the report and findings filed after the investigation was terminated were both "gratuitous" acts. The reasoning behind the Commission's decision to terminate, the court continued, even though it showed that the Commission "decided" that the discontinuances were proper, is part of the power to terminate and within the "sole discretion" of the Commission, and not subject to judicial review. The court reasoned that the primary purpose of an investigation and the hearings was to give the Commission enough information so that it would be able to reach a sound judgment as to whether it should interfere with the proposed cutbacks in rail service. Two situations were posed: (1) Where the Commission knows enough about the situation, as in the *New Jersey* case, *supra,* at 328, it will hold no investigation, and the discontinuance will occur automatically; and (2) Where the Commission does not know enough about the problem, it will investigate, hold hearings, determine (as in this case) that the discontinuance does not warrant its interference, terminate the investigation, and the discontinuance will *still* occur automatically. There is, said the

court, no logical difference between the two situations. Where the Commission decided to take action, the order requiring continuance for one year would be reviewable; however, the "mere decision of the Commission to take no action is not". *Minnesota, supra,* at 112. To provide review of decisions to terminate investigations, concluded the court, would not only be contrary to the clear meaning of § 13a(1), but would be poor policy, "since it might even encourage the Commission not to investigate doubtful cases." *Id.,* at 113.

The court in *State of New Hampshire* v. *Boston and Maine Corp.,* 251 F.Supp. 421 (D.N.H. 1965), recognized that there might be some unfairness here. However, it said that Congress, in meeting what was almost a crisis situation, could provide review for one side (the railroads), especially where the other side would be seeking review of Commission "non-action", if there were cogent policy considerations to call for such a result. *Id.,* at 425. It is entirely within the spirit of the legislation to have given the railroads rapid relief without lengthy review. In fact, it was the delay inherent in the proceedings before the state commissions that called forth the passage of Section 13a(1). See the discussion of the legislative history in, e.g., *State of Vermont* v. *Boston and Maine Corp.,* 269 F.Supp. 80, 84 (D. Vt. 1967).

These considerations sufficiently meet, in this court's opinion, the contention by two later courts that Congress did not intend to deny judicial review in the present circumstances. *Vermont, supra; City of Williamsport* v. *United States,* 273 F.Supp. 899, 902-903 (M.D.Pa. 1967).*

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* The same underlying facts were the substance of the case of *City of Williamsport* v. *United States,* 282 F. Supp. 46 (M.D. Pa. 1968), affirmed *per curiam* 392 U.S. 642 (1968). This case decided that the Commission has the power to order a partial continuance of operations, but did not discuss the jurisdictional question at all. There was also no discussion of the jurisdictional issue in *People of the State of California* v. *United States,* 258 F. Supp. 950 (N.D. Cal. 1966).

Further supporting this conclusion is the fact that in Section 13a(2), which deals with wholly intrastate operations, Commission approval is expressly necessary before a railroad can discontinue any service. 49 U.S.C. § 13a(2). The provisions, therefore, in 28 U.S.C. § 1336, that only Commission "orders" are reviewable, call for judicial review in cases falling under Section 13a(2). But where, as in Section 13a(1), the statute is self-implementing, no comparable "order" of the Commission is involved. Taking the statute in its entirety, it seems apparent that Congress intended to deny judicial review in the instant case.**

** The Commission takes the position that review is proper under the present statute but has requested an amendment to the Act to remove any doubt. *Vermont, supra,* at 83-84, n. 2.

This court, in view of its opinion on the jurisdictional issues, does not pass on the other questions presented.

It is therefore ordered that the defendant Chicago & Eastern Illinois' motion to dismiss be, and it is hereby granted and the cause is hereby dismissed.

WIN G. KNOCH
Circuit Judge

J. SAM PERRY
District Judge

EDWIN A. ROBSON
District Judge

January 8, 1969.

APPENDIX C

F-9449

Served January 31, 1968

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—Discontinuance of Trains Nos. 93 and 54 Between Chicago, Ill., and Evansville, Ind.

Decided January 25, 1968.

Upon investigation, found that operation by the Chicago & Eastern Illinois Railroad Company of passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., is not required by public convenience and necessity, and that the continued operation thereof will unduly burden interstate commerce. Investigation discontinued.

James H. Durkin and *Edwin Richardson* for rail carrier.

J. Fred Parker for Georgia Public Service Commission, protestant.

William H. Wilson for Public Service Commission of Indiana, protestant.

Mary Louise Wolford for the public of the State of Indiana, protestant.

Edward G. Finnegan, Leon J. Heidgen and *James A. Parker* for Illinois Commerce Commission, protestant.

Harold Cowen and *Bernard Rane* for city of Chicago, Ill., protestant.

Robert S. Matthews and *Ronald Warrum* for city of Evansville, Ind., protestant.

Keith E. Roberts for village of Milford, Ill., and city of Watseka, protestants.

William E. Nelson for city of Hoopeston, Ill., protestant.

Marion E. Wright for city of Danville, Ill., protestant.

Robert F. Doolittle, Jr. for city of Vincennes, Ind., protestant.

Frederick T. Bauer for city of Terre Haute, Ind., protestant.

Raymond J. Kearns for Sisters of Providence, St. Mary of the Woods, Ind., protestant.

William P. Byroad, Gordon E. Cox, B. L. Dresbach, Thomas J. Duggan, George B. Lee, J. Thomas McNeal, William E. Nelson, Earl G. Quinn, Keith E. Roberts, J. H. Smith, and George P. Sheahan for various railway labor organizations.

Report of the Commission

Division 3, Commissioners Tuggle, Bush, and Stafford

TUGGLE, *Commissioner:*

Pursuant to the provisions of section 13a(1) of the Interstate Commerce Act as amended, the Chicago & Eastern Illinois Railroad Company (C&EI), a common carrier by railroad subject to the provisions of part I of the act, on August 31, 1967, filed notices and supporting statements in which it proposed to discontinue, effective October 1, 1967, service by its interstate passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., a distance of 287 miles. Copies of the notices were duly served and posted in the manner required by section 13a(1) and our rules and regulations thereunder.

By petition filed concurrently in Finance Docket No. 24726, C&EI seeks authority under section 13a(2) to discontinue service by its intrastate passenger trains Nos. 3 and 4 between Chicago and Danville, Ill. That proceeding is the subject of a report and recommended order[1] of the

[1] By petition filed December 14, 1967, C&EI sought omission of the examiner's report and recommended order in Finance Docket No. 24726 and consolidation of that matter with this proceeding. Replies thereto were filed by certain protestants, and by order entered January 8, 1968 the petition was denied.

hearing examiner served separately. C&EI's application filed with the Illinois Commerce Commission for authority to discontinue trains Nos. 3 and 4 was denied by that body on September 20, 1967. Appropriate notice of the petition filed here in Finance Docket No. 24726 was served on the Governor of the State of Illinois.

Protests to C&EI's proposal in the titled proceeding were filed by communities along the line and State, civic, business, and railway labor interests, as well as users of the trains. By order of September 18, 1967, we instituted an investigation and required continued operation of trains Nos. 93 and 54 pending a hearing and decision (up to the statutory maximum of 4 months). Because of the statutory limitation on the time available for investigation and decision, our order provided for omission in the titled proceeding of a report and recommended order by the examiner as part of the decisional process and for certification of the record to us for initial decision.

Public hearings were held in Chicago, Momence, Watseka, Hoopeston and Danville, Ill., and Evansville, Vincennes, and Terre Haute, Ind., on a consolidated record with the section 13a(2) proceeding in Finance Docket No. 24726. Briefs were filed by C&EI, the Illinois Commerce Commission, and jointly by the village of Milford, the cities of Watseka, Danville and Hoopeston, Ill., and the Brotherhood of Railroad Trainmen.

At the hearing protestants moved for dismissal of the proceedings on several grounds, principally that since Missouri Pacific Railroad Company (MoPac) controls C&EI, use of financial data relating only to C&EI and excluding MoPac is grossly misleading and contrary to the provisions of the act. Other relief sought included suspension or termination of the proceedings and oral argument on the motion. C&EI replied in opposition, and the motion was taken under advisement. The protestants pursue the argument on brief.

The motion is denied. Oral argument is not warranted. By contending MoPac is a necessary party to these proceedings, protestants ignore the plain language of section 13a of the act, which confers upon this Commission jurisdiction over proposed passenger train discontinuances by "a carrier or carriers subject to this chapter." Clearly, C&EI falls within the term "a carrier" subject to part I of the act. Whether or not the statutory standards for ordering a continuance of service are met is a matter which, in this case, does not depend (as will later be made clear) upon the corporate relationship of MoPac and C&EI. Piercing the corporate veil may be warranted in some situations, as for example, where false and misleading representations are made or where some unlawfulness may be involved, and perhaps in other circumstances, but here no such question is raised and no substantial reason is advanced to pursue that course. The record indicates that C&EI is the proper party in interest and that it has fully cooperated in presenting the data required for our action.

Trains Nos. 93 and 54 operate on the following schedules:

Train No. 93 daily	Miles	Stations	Train No. 54 daily
P.M.			A.M.
3:45	0.0	Lv. Chicago, Ill. .....Ar.	10:35
3:59	6.6	Chicago (63rd St.)	10:21
A4:30	28.8	Steger	E 9:44
....	77.5	Watseka	G 8:49
6:10	123.2	Danville	7:55
7:15	177.5	Terre Haute, Ind.	6:40
B7:45	203.7	Sullivan	G 6:11
8:18	234.7	Vincennes	5:40
D8:50	259.0	Princeton	5:05
9:55	287.2	Ar. Evansville .....Lv.	4:30

A—Stops to receive passengers.
B—Stops to discharge revenue passengers from Chicago and Steger.
D—Stops to discharge or receive revenue passengers.
E—Stops to discharge passengers.
G—Stops to receive revenue passengers for Chicago.

Their operation is in conjunction with trains of the Louisville & Nashville Railroad (L&N) similarly designated, which operate between Evansville and Atlanta, Ga., and Montgomery, Ala. The interchange is at Evansville. The L&N splits its southbound No. 93 at Nashville, Tenn., with one section terminating at Atlanta and the other at Montgomery. L&N originates one section of its northbound train No. 54 at Atlanta and the other at Montgomery, and consolidates the two at Nashville.

The trains, designated "The Georgia—Hummingbird," carry passengers and baggage. They are powered with three diesel locomotives, and have a consist of 10 regularly assigned cars daily with 11 cars on Friday, Saturday and Sunday. Train No. 93 leaves Chicago with a baggage-mail car, a dormitory, diner, lounge, sleeper and two coaches destined to Atlanta daily; a coach destined to Evansville on Friday, Saturday and Sunday; two coaches destined to Montgomery daily; and a sleeper destined to Mobile daily. Train No. 54 has a baggage-mail car, a dormitory, diner, lounge, sleeper and two coaches orignating at Atlanta daily; a coach originating at Evansville on Friday, Saturday and Sunday; two coaches originating at Montgomery daily; and a sleeper originating at Mobile daily; all cars having destination to Chicago. The passenger-carrying equipment is air-conditioned.

Due to a restructuring of mail service by the U. S. Post Office Department, the mail cars were discontinued as of June 10, 1967, except for one storage-mail car from Chicago to Birmingham, Ala., and in October 1967, the Post Office Department removed that car. The mail handled in the baggage-mail car is minimal. Train No. 93 still carries express traffic for the account of Railway Express Agency, Inc., destined to Chattanooga. These trains do not handle the express to or from C&EI points south of Chicago.

Alternate passenger transportation service to and from the communities served by C&EI between Chicago and

Evansville, and south thereof served by L&N is available by bus and by air at most points. There are four flights daily southbound and three northbound between Chicago and Danville; two flights daily southbound and three northbound between Chicago and Terre Haute; and four flights daily southbound and five northbound between Chicago and Evansville. Numerous flights are scheduled between Chicago, on the one hand, and, on the other, Atlanta, Chattanooga, Birmingham, Nashville, Montgomery, and Mobile, and between Evansville and Atlanta. Watseka and Hoopeston, Ill., Sullivan, Vincennes and Princeton, Ind., have no air service.

A major bus line operates three southbound and four northbound buses daily between Chicago and Evansville, with stops at all intermediate points served by the subject trains. Rail transportation is available, though limited, (a) by C&EI trains Nos. 3 and 4 between Chicago and Danville (but those are the trains involved in Finance Docket No. 24726, the discontinuance proceeding referred to above) and (b) by Illinois Central Railroad (IC) between Chicago and Carbondale, Ill., and points south thereof (four trains daily in each direction). Highway distances between communities served by C&EI and those served by IC in Illinois vary from 12 to 35 miles. Bus fares are lower than rail fares between Chicago and all points served by the subject trains, except Sullivan, Ind. Air fares are higher than rail or bus.

C&EI maintains that it has lost patronage to the private passenger automobile (as a mode of intercity transportation), and, as evidence thereof, introduced statistics showing the increase in the number of registered automobiles in the counties of Illinois and Indiana traversed by the subject trains. Considering the five Illinois counties (Cook, Will, Kankakee, Iroquois, and Vermillion) and the six Indiana counties (Park, Vigo, Sullivan, Knox, Gibson, and

Vanderburg) it was shown that in 1960 the Illinois counties had 1,653,520 registrations while the Indiana counties had 132,253, and that by 1966, there was an increase of about 20 percent—to 1,994,751 in the Illinois counties and 158,186 the Indiana counties.

For the benefit of automobile users, Illinois Highway 1 between Chicago and Danville and U. S. Highway 41 between Danville and Evansville are adjacent to and parallel the line of C&EI. Also U. S. Highway 41 continues northward in Indiana east of Illinois Highway 1 to Chicago. Both are first class highways and U. S. Highway 41 has substantial segments with four lanes. A number of witnesses testified to the effect that driving on the highways is dangerous. South of Chicago and its suburbs the roads traverse sparsely populated areas, are generally straight and the terrain is flat.

The population[2] at the points served by the subject trains was shown as follows: Chicago 3,550,404, Chicago Heights 41,000, Watseka 5,219, Hoopeston 6,606, Danville 41,856, Terre Haute 72,500, Sullivan 4,979, Vincennes 18,046, Princeton 7,906, and Evansville 141,543.

A number of those points have commercial or service areas extending beyond their corporate limits and the population reflected by such areas is larger than for the point involved.

During the periods 1965, 1966 and first 6 months of 1967, train No. 93 carried 84,259, 82,213 and 31,913 passengers, respectively, of which 53,344, 56,230, and 20,952 were delivered to L&N at Evansville. The daily average numbers of revenue passengers transported by that train for the same periods were 230,225, and 176, respectively, of which

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[2] Based on the census taken in 1960. Since that time, some of the areas served have had population increases.

84, 71, and 60, respectively, were local passengers (traveling between C&EI stations). During the same periods, train No. 54 carried 76,854, 75,271, and 28,186 revenue passengers, respectively, of which 57,983, 60,063 and 21,682, were received from L&N at Evansville. The daily average numbers of revenue passengers transported by that train for the same periods were 210, 205, and 153, of which 51, 40, and 33, respectively, were local. The foregoing data were determined from analysis of records of tickets collected by conductors, cash fares received, and tickets honored but not collected, apportioned to the subject trains according to the number of miles traveled thereon.

The supporting studies also show the numbers of passengers boarding and deboarding at each station. Considering the last 6 months of 1967 as representing the present level of patronage, of the 176 passengers on train No. 93, an average of 156 boarded at Chicago, 12 at Steger, 5 at Danville, 2 at Terre Haute and 1 at Vincennes, and 17 left the train at Danville, 20 at Terre Haute, 1 at Sullivan, 7 at Vincennes, 2 at Princeton, 13 at Evansville, and 116 continued on the L&N. Of the 153 passengers on train No. 54 an average of 120 were through passengers from the L&N, 12 boarded at Evansville, 2 at Princeton, 6 at Vincennes, 1 at Sullivan, 11 at Terre Haute, 4 at Danville, and 1 at Watseka, and 3 left the train at Terre Haute, 3 at Danville, 8 at Steger and 139 at Chicago. Thus, the record shows that the C&EI points south of Chicago have had few passengers boarding or leaving the trains.

C&EI's balance sheet statement as of July 31, 1967, shows assets aggregating $119,182,901, including current assets of $10,220,039, special funds $484,841, investments $10,941,671, total properties less depreciation and amortization $96,182,478, and other assets and deferred charges $1,353,872. Liabilities were: current liabilities of $9,631,-117, long-term debt of $53,494,944 (including $3,103,470

due within 1 year), reserves $659,983, other liabilities and deferred credits $619,844, capital stock $29,837,372, capital surplus $112,522, and retained income $24,827,119. Its income statements for 1965, 1966 and first 7 months of 1967, show railway operating revenues of $40,578,936, $41,780,952, and $23,604,275; net railway operating income of $3,486,070, $4,091,786, and a deficit of $1,005,900; and net income after fixed charges and other deductions of $1,736,086, $2,853,372, and a net deficit of $1,757,265, respectively.

C&EI has incurred annual net railway operating deficits in its passenger service in amounts in excess of $1 million for the years 1962 through 1966, inclusive. More than 20 percent of freight net income has been required to subsidize these rail passenger deficits in each of the years 1957 through 1966, except 1959 when the percent of freight net income so required exceeded 12 percent. C&EI estimates that the national award of September 16, 1967 to the shopcraft employees, retroactive to January 1, 1967, will increase its labor costs by $210,000 in 1967 and by $321,000 in 1968. Further, a recent agreement with the Brotherhood of Locomotive Engineers will result in payment of $100,000 to C&EI locomotive engineers in backpay. None of those additional expenses were included in determining the cost of operating the subject trains during the first 6 months of 1967, or in projections made.

C&EI shows data respecting the financial results of the operation of the trains for the years 1965, 1966, and the first 6 months of 1967. In 1965, train No. 93 had revenues (passenger, diner, express and mail) of $1,096,607 and out-of-pocket expenses of $1,001,950 for a net income of $94,657. For the same year, train No. 54 had similar revenues of $811,156, and out-of-pocket expenses of $862,270 for a net out-of-pocket loss of $51,114. In 1966, the corresponding figures for train No. 93 were $1,083,494 revenues, $1,125,287 costs, and $41,793 deficit; for train No. 54 they

were $816,863 revenues, $1,022,127 costs, and $205,264 deficit; the combined net loss for both trains was $247,037. In the first 6 months of 1967, the corresponding figures for train No. 93 were $420,167 revenues, $522,421 costs, and $102,254 deficit, and for train No. 54, $311,281 revenues, $477,387 costs, and $166,106 deficit; the combined net out-of-pocket loss was $268,360. Details of the revenues and expenses for those periods indicated as computed by the carrier are shown in the attached appendix A.

As indicated, actual revenues from these trains, including carbire revenue are reflected in the data presented. The following actual expenses were also employed: Train engineman expense, traincrew expense, sleeping car expense, insurance, expenses incurred in clearing wrecks, baggage loss and damage claims, injuries to persons and dining car and buffet car service. Other expenses and savings data were computed using methods approved by the Commission in prior proceedings. Increases in expenses for 1966 over those of 1965 occurred in four accounts (a) passenger train cars—repairs, (b) equipment depreciation—passenger cars, (c) train supplies and expenses, and (d) joint facility accounts. These were the subject of detailed inquiry. On (a) an accident to train No. 93 at Hoopeston in April 1966, were required extensive repairs to passenger cars ($59,506). Expenses charged to that account in 1965 were abnormally low. On (b) C&EI did not, until 1967, retire its head-end equipment used on other trains in 1965 and 1966, having made such equipment available to the U. S. Post Office Department for use in trains Nos. 93 and 54. Retirements of head-end equipment in 1967, when mail was removed from all C&EI passenger trains amounted to $365,549, but this increase in expense was not reflected in the financial results discussed above. In projecting revenues and expenses involved in operating the subject trains without the mail

revenue equipment, depreciation on only those cars which would be required to operate the subject trains without any head-end business was considered. On (c) the total passenger portion of the account actually decreased in 1966, but spreading the expense over fewer trains than in 1965, resulted in an increased allocation to the remaining trains. On (d) the increase in joint facility expenses in 1966 was due to the discontinuance of passenger trains by other railroads using such facilities, which added proportionally to the expense burden on the remaining trains.

Trains Nos. 93 and 54 use joint facilities at Chicago with four other railroads, and with one other at Terre Haute, Vincennes, and Evansville. During the first 6 months of 1967, no C&EI passenger trains, other than the subject trains used the Terre Haute, Vincennes and Evansville facilities, and as a result, all of the amounts paid for use of those facilities ($25,356, $18,136, and $104,328, respectively) are savable. Joint facility costs were computed in accordance with those methods and standards approved in *Chicago, R. I. & P. Co., Discontinuance of Trains,* 328 I.C.C. 278.

The foregoing data reflect revenues received by C&EI for transportation of mail. Projected annual revenues and out-of-pocket expenses, exclusive of mail traffic, using 1966 revenue data, show that C&EI would incur an annual loss of $242,850 in the operation of train No. 93 and $191,780 in the operation of train No. 54. In projecting equipment depreciation and other expense items only the equipment that actually would be used was considered. The projected annual revenues and out-of-pocket expenses, exclusive of mail traffic, were shown as follows:

	Train No. 93	Train No. 54
Revenues:		
102 Coach[1]	$532,953	$468,549
102 First class[1]	87,680	113,593
103-108 Baggage and other[1]	2,270	1,153
107 Express[2]	587	34,909
131 Dining and buffet[1]	47,844	47,844
Total revenue	671,334	666,048
505-538 Car-hire, net[3]	4,785	4,785
Revenue and income	676,119	670,833
Total expense	918,969	862,563
Profit or loss	(242,850)	(191,730)
Expenses:		
Maintenance of equipment—		
311 Repairs, diesel locomotives[4]	53,406	53,390
317 Passenger train car repairs[5]	141,817	141,817
331 Equipment depreciation—locomotive[6]	8,760	8,760
331 Equipment depreciation—cars[7]	30,103	30,103
335 Employee health and welfare benefits[8]	2,502	2,502
Traffic:		
351-360 Passenger traffic[4]	21,996	16,036
Transportation:		
373 Station employees[4]	15,650	14,568
376 Station supplies and expense[4]	3,062	2,768
378 Yard conductor and brakeman[9]	5,532	5,532
392 Train enginemen[10]	50,193	52,987
394 Train fuel[11]	30,400	30,400
397 Water for train locomotion[11]	1,781	1,781
398 Lubrication for train locomotion[11]	3,709	3,709
399 Other supplies for train locomotion[11]	168	168
400 Enginehouse expense—train[11]	8,108	8,108
401 Trainmen[10]	67,844	67,134
402 Train supplies and expenses[12]	88,308	88,308
403 Operating sleeping cars[4]	49,060	37,392
409 Employee health and welfare benefits[8]	5,163	5,222
Insurance[13]	16,405	16,405
419 Loss and damage—baggage[14]	550	480
420 Injuries to persons[14]	41,044	2,754
441 Dining and buffet service[4]	71,188	71,188

	Train No. 93	Train No. 54
Revenues:		
General:		
452 Clerks, accounting[4]	9,142	8,438
456 Employee health and welfare benefits[4]	360	324
All joint facility accounts[13]	170,720	170,720
532 Railway tax accruals[14]	21,958	21,542
Total expenses	918,969	862,563

[1] 1966 actual. The number preceding each item is the account number in the Commission's Uniform System of Accounts.
[2] Projected based on current traffic.
[3] Projected based on car assignments.
[4] Projected based on first 6 months 1967 expenses.
[5] Projected based on estimated car miles @ first 6 months 1967 cost per car mile.
[6] Based on two unit assignment.
[7] Based on cars required.
[8] Based on current G.M.A. rates applied to labor only.
[9] Based on current assignment.
[10] Based on 1966 payments plus wage increases.
[11] Based on 2 unit assignment @ first month 1967 cost per unit miles.
[12] Based on estimated car mile @ first 6 months 1967 cost per mile plus crews' lodging and meals at current costs.
[13] Based on current premiums.
[14] Based on 2.5 year average.
[15] Based on estimated car assignments.
[16] Based on current rates applied to labor only.

It is thus apparent that C&EI has incurred substantial losses in the operation of the trains Nos. 93 and 54 and that the losses will substantially increase as a result of the Post Office Department's removal of mail from those trains and the consequent discontinuance of passenger trains of other railroads using the Chicago terminal facility, although the latter factor was not considered in making the above projections.

Eight communities on the line served by the subject trains intervened in opposition: Chicago, Watseka, Mil-

ford, Hoopeston, and Danville, Ill., and Terre Haute, Vincennes, and Evansville, Ind. The trains do not serve Milford. Although some Illinois residents who ride C&EI train No. 4 northbound return on train No. 93 southbound, the witnesses testifying at communities in Illinois were primarily interested in th -ontinued operation of trains Nos. 3 and 4. The latter are the subject of the section 13a(2) proceeding in Finance Docket No. 24726 and, under the provisions of that section, are being dealt with in the report of the hearing examiner. Indiana interveners and witnesses testifying at Indiana points were concerned with continued operation of the subject trains.

Of the 144 public witnesses who testified on the consolidated record, 90 directed their testimony in whole or in part to the subject trains. Not all use the services of the trains. Thirty-one testified on behalf of State, county, city government or municipal organizations, civic or trade organizations, and colleges or universities, and one presented the views of a Congressman. A number were concerned with rail passenger service generally, though they themselves did not use the services provided by the subject trains. With few exceptions the public witnesses desire the trains continued in what would be a standby service for use as convenience in bad weather, at holiday periods and for shopping trips. No public witnesses testified at Chicago.

At Watseka, the mayor and representatives of the chamber of commerce and the County Farm Bureau indicated that, although they do not use the subject trains, there is need for rail passenger service in inducing industry to locate in the area. A surgeon testified to using the trains 20-24 times a year to and from Chicago where, he indicates, an increasing number of his patients require medical service. He owns an automobile, but does not use it on long trips.

At Hoopeston, the mayor and the president of the chamber of commerce expressed concern over rail passenger service. Testimony was given by a department store buyer and a beautician. Two personnel managers of large corporations indicated that prospective employees inquire about transportation facilities to and from Chicago. One could express no opinion as to whether discontinuance of the subject trains would have a detrimental effect on recruiting employees in Hoopeston; the other uses other trains of C&EI and was more concerned with their retention. The president of the Hoopeston Industrial Corporation points out that every prospective industry mentions transportation. A representative of a corn festival held annually each September in Hoopeston urges continuation of the service, but of the 100,000 persons attending the last occasion, he knew of only four who came by rail. The foregoing witnesses themselves rarely patronize the subject trains. Another witness rides train No. 93 during unusually heavy snowstorms when other means of travel are not available.

At Danville, municipal, commercial and other organizational spokesmen were concerned with rail passenger service generally and specifically C&EI trains other than those here involved. Several other witnesses proved to be only occasional patrons of trains Nos. 93 and 54—a bookkeeper, a number of railroad employees (who rated their on-time performance as poor), a housewife (who finds them crowded and often late), another housewife whose children sometimes use the trains going to and from colleges (particularly in bad weather), and an architect who expressed the view that the discontinuance would hamper Danville's development. Another witness who uses C&EI trains about once a month, occasionally drives his automobile to Chicago, but would not go by bus because he considers the bus routes circuitous and the service time consuming. Support for continued operation was voiced by a junior chamber of commerce spokesman for 110 mem-

bers who testified that he used the trains only once, but that the majority of the membership use all C&EI trains; and by the chamber of commerce (representing 116 manufacturing firms) as part of its program to promote improvement in transportation. Several manufacturing organizations indicated that some of their employees occasionally use the trains. Spokesmen for three civic organizations use the trains several times a year, particularly during inclement weather, but also have used alternate transportation, including private automobile. A number of the witnesses testified that the northbound train is frequently late and dirty, that this was reported to the railroad and that there was little effective response.

At Evansville, the mayor and a State senator opined that discontinuance of the trains would be detrimental to the growth of industry and commerce in the community. The mayor uses air service on many occasions and uses rail service about once every 6 months. The senator does not have occasion to use C&EI's service. The chamber of commerce spokesman urged that the discontinuance be deferred until L&N acquires the eastern side of C&EI's line, although the transportation division which he represents voted six to three against opposing discontinuance. An aide to a member of Congress from Indiana presented the Congressman's views that rail passenger transportation service is vital to the economic growth of the community, and that all modes of transportation must be kept available. Other witnesses testified to a preference for rail over alternate modes for the occasional trips they take, though some of them found the rail cars crowded, dirty and sometimes unheated. Among them was the representative of a religious community having 30 nuns stationed at Evansville. She indicated that her order's recent transportation requirements were accomplished through use of charter bus service, and that the sisters have sufficient automobiles at their disposal.

At Vincennes, the mayor opposed the discontinuance but, in so doing, was not supported by the city council. The chamber of commerce mailed 475 questionnaires to area residents regarding the proposed discontinuance; 82 were returned showing a 3 to 1 preference for keeping the trains on. A survey at Vincennes University revealed that 22 of the 2,243 students use the trains. Members of the faculty use them twice a year. Seven students said they hope to use them more frequently, particularly during bad weather. A number of other witnesses—all of them only occasional users—complained about the condition of the trains and the station at Vincennes, about a poor on-time record, crowded and dirty equipment. All of the above witnesses urge continuation of the service with improvement of quality.

At Terre Haute, the mayor pressed the view that passenger train service is needed in the development of industry and commerce. On his six trips to Chicago in the past year he used train service once when his air flight was grounded on account of bad weather. The chamber of commerce cited statistics showing growth in population, commerce, enrollment in the universities and retail sales as yardsticks of a demand for improved service. Aware that loss of mail revenues has precipitated discontinuance of passenger rail service, it argued that the railroad should consider providing complete service, freight and passenger, and should look to the passenger market as any other business man looks at a new market. Further, that a successful company expects to absorb departmental losses within its gross earnings in order to provide a complete service. Professors and students of a local university, opposing the discontinuance, testified to their use of the trains variously from regular weekend use to once or twice a year during inclement weather. Student ownership of automobiles by upper classmen is permitted and some of the students use the trains only when they cannot

obtain automobile transportation. Student use of the trains is primarily on holidays and at the beginning and end of summer vacation. While enrollment at the local university has more than doubled in the past 6 or 7 years, use of the trains at Terre Haute has continued to decline.

A religious order with national headquarters at nearby St. Mary of the Woods has 350 members who ride the trains to Chicago twice annually for connections east and west thereof. The order has a number of automobiles at its disposal and has used them and bus service for Chicago trips. In advertising for its college the order would like to be in a position to advise prospective students that easy access is available via rail among other modes. It has had some difficulty with on-time performance of the trains, particularly in making connections. The college has about 400 students, a number of whom are from the Chicago area.

Some evidence was presented to show the carrier's car-cleaning program and the problems involved. Sometimes delay in arrival at Chicago requires quick turnaround, and cleaning of the cars leaves much to be desired. The record indicates that C&EI has made some effort to overcome the problem but must deal with C&WI which maintains the Chicago terminal facility.

Discussion and conclusions.—Numerous factors are considered in determining whether to order the continuance of service under section 13a(1) of the act. Among them are public use of the service, population of the area, effect of a train discontinuance upon the communities served, available alternate transportation, financial results of the operation, prospects for the future, and the carrier's financial condition. The weight to be given each factor depends on the circumstances in a particular case. No one factor is necessarily controlling. The intent of Congress in enacting section 13a was to enable carriers to discontinue train services that no longer pay their way, and for which

there is no longer sufficient public need to justify the financial loss involved. See *Southern Ry. Co.* v. *North Carolina*, 376 U.S. 93.

At one time the passenger train was the pride of the transportation system. This was especially so in the United States where there was vast wilderness to be tamed, rich deposits of natural resources to be tapped, and large, widely-separated cities to be connected. The railroad and its passenger trains provided the strands for tying the far-flung areas together, and the channels for rapid, efficient communication and transport. Time and inventive genius created more efficient means for performing a number of the functions for which we formerly relied on the rails. Electronics provide instant communication, and airplanes cut transport time tremendously for people, mail and express. The automobile and the supper highway—for which the American people have a special fascination—provide particular convenience which other modes cannot duplicate.

The evidence now before us shows that the subject trains no longer are used by express shippers (except for some movements between Chicago and Chattanooga), or by the Post Office Department for mail (once a highly remunerative source of traffic and a primary source of sustenance for passenger trains). Passenger traffic has been dwindling. In the meantime, costs continue upward inexorably. The general rise in costs throughout the economy are reflected in the railroad's expenses for employees, equipment, fuel, supplies, facilities and services. With the loss of mail revenues making a dramatice change in the financial results of the operation, C&EI would have to absorb an out-of-pocket deficit well over $400,000 per year in order to continue trains Nos. 93 and 54. It is likely that the deficit would go beyond a half million dollars.

Financially, this carrier is at best marginal. It has a history of deficit operation and is beset with numerous

problems flowing therefrom regarding rehabilitation of its line and recovery of traffic. See *Missouri Pac. R. Co. —Control—Chicago & E. I. R. Co.*, 327 I.C.C. 279 (1965). The slender profit shown on this record for 1965 and 1966 occurred at the height of a record breaking period of national prosperity. The relatively slight slowdown in the national economy during 1967 had an immediate and telling effect on C&EI's operation, creating a net deficit of nearly $2 million in the first 7 months of the year. C&EI is an important link in the national rail system and from the point of service in its own area and as an integral part of the national system, its viability is a thing much to be desired. Continuance of the subject trains would militate against that objective. There is no reasonable prospect for relief from the financial burdens imposed by those trains. To the contrary, all indications are that the burdens would mount. And this, in turn, would soon intensify the railroad's malaise, all to the detriment of the public.

The people who have been using the trains for travel have done so largely on an occasional or standby basis. Their primary means of conveyance are the automobile and other nonrail modes. The testimony of the governmental leaders, business representatives, students and housewives is clear proof of that. The witnesses themselves appear to prefer air and automobile travel. Many gave opinions about a need for rail passenger service in the interest of community and commercial growth, but few hard, realistic facts were advanced by them in support. The passenger-use statistics stand as stark proof that, regardless of what is felt and said, the people along the C&EI's Evansville-Chicago line are not using the trains. Their patronage is minimal.

For those who must depend upon public transportation, bus service is far more plentiful than the train service—at all points on the line. Use of the buses will require

an adjustment, but whatever inconvenience might be experienced does not outweigh, on the scale of the public interest, the tremendous burden continued operation of the trains would involve. We conclude that discontinuance by C&EI of trains Nos. 93 and 54 is consistent with the purpose of section 13a(1) of the act, and the objectives of the national transportation policy.

Certain railway employees seek imposition of the *Burlington* or similar conditions in the event the discontinuance is authorized. Similar requests have been considered in prior proceedings of this nature, and the Commission has uniformly held that we do not possess authority to impose conditions for the protection of railway employees who may be adversely affected as a result of the discontinuance of passenger service under section 13a(1). See *Great Northern Ry. Co. Discontinuance of Service*, 307 I.C.C. 59. However, the probable effect of such discontinuance on employees is a matter to be considered in determining whether the public convenience and necessity require the continuance of such service. We have considered that factor, and, in our opinion, the probable adverse effect upon employees does not afford sufficient grounds to order continuance of the service.

Contentions of the parties as to fact or law not specifically discussed herein have nevertheless been considered and found to be without merit or material significance.

We find that the operation by the Chicago & Eastern Illinois Railroad Company of passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., is not required by the public convenience and necessity and that continued operation thereof would unduly burden interstate or foreign commerce.

An appropriate order will be entered discontinuing the investigation herein.

APPENDIX A

Statement of revenues and expenses for trains Nos. 93 and 94 in 1965, 1966 and 6 months of 1967

	1965		1966		Six Months 1967	
	Train No. 93	Train No. 94	Train No. 93	Train No. 94	Train No. 93	Train No. 94
Revenues:						
102 Coach (1)	$ 516,762	$ 480,139	$ 532,953	$ 468,549	$ 235,039	$ 197,355
103 First class (1)	90,032	122,097	87,680	115,593	33,431	45,172
103-106 Baggage & other (1)	1,606	493	2,270	1,153	2,970	1,315
106 Mail-RPO (1)	81,043	62,304	82,843	82,843	12,483	12,483
106 Mail-storage (1)	305,137	50,854	305,621	94,111	110,356	37,510
107 Express (1)	4,311	906	2,955	4,762	7,258	4,436
131 Dining & buffet (1)	45,874	45,875	47,844	47,844	18,910	18,910
Total Revenue	1,044,765	762,668	1,062,166	814,855	420,447	317,181
305-538 Car hire, net (1)	51,042	48,488	21,328	2,008	(280)	(5,900)
Total Income (2)	1,095,807	811,156	1,083,595	816,863	420,167	311,281
Total Expense (See below)	1,001,950	862,270	1,125,287	1,022,127	527,421	477,387
PROFIT OR (LOSS)	93,857	(51,114)	(41,793)	(205,264)	(107,254)	(166,106)
Maintenance of Equipment:						
311 Repairs, diesel locomotives (3)	54,497	54,897	70,299	70,959	26,703	26,695
317 Passenger-train cars-Repair (4)	89,300	72,511	174,853	143,022	75,937	70,864
331 Equip.Depre.(52)Loco.(5)	12,996	12,996	12,996	12,996	6,498	6,498
331 Equip.Depre.(54)Pass.Cars(6)	56,051	55,739	59,211	58,431	28,498	27,882
335 Emp. H&H benefits (7)	2,334	2,173	2,916	2,841	1,799	1,750
Traffic:						
351-360 Passenger Traffic (8)	17,896	13,539	19,959	14,916	10,998	8,018
Transportation:						
373 Station employees (9)	67,445	26,784	64,723	29,376	24,154	11,641
376 Sta. supplies & exp. (10)	2,568	1,568	2,568	1,568	1,531	1,384
378 Yard Cond. & Brkmn. (11)	3,436	3,436	1,661	1,691	1,832	1,832
392 Train enginemen (1)	48,669	51,395	47,803	50,368	23,674	24,517
394 Train Fuel (3)	58,187	58,614	44,150	44,583	18,607	18,401
397 Water for train Loco. (3)	1,506	1,517	2,486	2,510	1,078	1,078
398 Lubs. for train Loco. (3)	2,746	2,766	3,127	3,156	2,345	2,345
399 Other supplies for train loco. (3)	648	654	377	380	101	101
400 Engine. expense train (3)	14,820	14,929	12,395	12,511	4,909	4,908
401 Trainmen (1)	61,163	61,881	64,651	63,937	29,278	29,201
402 Train supplies & exp. (12)	64,778	57,268	99,105	84,673	47,025	44,627
403 Operating sleeping cars (1)	46,199	49,385	41,171	51,581	24,530	18,696
409 Emps. H&H benefits (13) insurance (1)	7,727	6,134	6,394	5,508	2,459	2,468
415 Clearing wrecks (1)	12,172	12,172	12,178	12,178	8,786	8,786
419 Loss & damage-baggage (1)	---	---	4,987	---	---	---
430 Injuries to persons (1)	230	20	492	492	484	484
441 Dining & buffet serv. (1)	78,350	2,375	22,782	2,393	11,000	1,647
	69,161	69,161	76,839	76,839	35,594	35,594
General:						
452 Clerks, accounting (14)	13,566	13,444	10,972	10,292	4,571	4,179
456 Emps. H&H benefits (15)	580	576	429	404	180	162
All Joint Facility Accounts (16)	212,554	215,158	244,132	236,092	119,498	113,697
532 Ry. tax accruals (17)	24,350	20,196	29,431	25,381	10,992	10,422
TOTAL EXPENSES:	1,001,950	862,270	1,125,287	1,022,127	527,421	477,387

NOTES:

(1) Actual.
(2) Revenue plus car hire.
(3) Passenger portion of account divided by passenger unit-miles times unit-miles per train.
(4) Passenger portion of account divided by passenger car-miles exclusive of sleeping car-miles times actual car-miles per train.
(5) At I.C.C. rates distributed to trains on basis of units assigned.
(6) At I.C.C. rates distributed to trains on basis of actual car-miles.
(7) G.M.A. rates applied to labor portion of accounts Nos. 311 and 317.
(8) Distributed on basis of revenue pro rata.
(9) Includes mail handlers, also C&EI station employees.
(10) Trains Nos. 93 and 94's portion of Danville depot expense.
(11) Evansville border - actual.
(12) Passenger portion of account divided by passenger car-miles including sleeping car-miles.
(13) G.M.A. rates applied to labor portion of accounts Nos. 373, 378, 392 and 401.
(14) Revenue pro rata of actual wages.
(15) G.M.A. rates applied to labor portion of account No. 452.
(16) Savable portion of joint facility expense at Chicago, Terre Haute, Vincennes and Evansville.
(17) R.R. and U.I. rates (G.M.A.) applied to labor portion of accounts Nos. 311, 317, 331 through 360, 373, 378, 392, 401 and 452.

Order

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 25th day of January 1968.

Finance Docket No. 24725

Chicago & Eastern Illinois Railroad Co.—Discontinuance of Trains Nos. 93 and 54 Between Chicago, Ill. and Evansville, Ind.

Investigation of the matters and things involved in this proceeding having been made pursuant to the order of said division, dated September 18, 1967, a hearing having been held and the said division on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That this investigation be, and it is hereby discontinued, and that this order shall be effective 35 days from the date hereof.

By the Commission, division 3.

H. Neil Garson,
Secretary.

(Seal)

APPENDIX D

Service Date
May 15, 1968

Order

At a Session of the Interstate Commerce Commission, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 8th day of May, 1968.

Finance Docket No. 24725

Chicago & Eastern Illinois Railroad Co.—Discontinuance of Trains Nos. 93 and 54 Between Chicago, Ill. and Evansville, Ind.

Upon consideration of the record in the above-titled proceedings, including the petition filed by the Cities of Chicago, Danville, Hoopeston, Terre Haute, Vincennes, and Watseka and the Village of Milford, on March 1, 1968, for reconsideration of the order of the Commission, Division 3, dated January 25, 1968, authorizing the above-titled discontinuance; applicant's reply thereto; petitioners' motion to strike certain matter appearing in the reply; and applicant's reply to the motion; and

It appearing, That the matters appearing in the reply to the petition objected to in the motion to strike are not of record in this proceeding and therefore not properly before this Commission as evidence and that no objection is made to the motion to strike;

It further appearing, That in order to invoke the jurisdiction of this Commission under section 13a(1) of the Interstate Commerce Act a carrier must comply with certain requirements, including the posting of notice "in each station, depot, or other facility involved" (49 CFR 43.5 (j)), which notice must contain a "complete description of the present service of the train . . . involved and of the discontinuance or change of operation or service pro-

posed" (49 CFR 43.5(c)); and that the purpose of requiring such notice is to give the travelling public affected the opportunity to protest the proposed discontinuance; and

It further appearing, That applicant in the above-titled proceeding failed to give the proper notice required, as described above, in that no notice was posted in those facilities along the through route of trains Nos. 93 and 54 south of Evansville, Ind., and the notice as posted contained no mention of the through-route nature of the trains south of Evansville; and that applicant therefore has not effectively invoked the jurisdiction of this Commission in the above-titled proceeding:

It is ordered, That the motion to strike certain matters appearing in applicant's reply to the petition for reconsideration be, and it is hereby, granted;

It is further ordered, That the petition, insofar as it seeks dismissal of the above-entitled proceeding for failure to invoke this Commission's jurisdiction under section 13a(1), be, and it is hereby, granted, and in all other respects is denied.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX E

Service Date
May 15, 1968

Corrected Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 8th day of May, 1968.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND BETWEEN CHICAGO, ILL. AND EVANSVILLE, IND.

Upon consideration of the record in the above-titled proceedings, including the petition filed by the Cities of Chicago, Danville, Hoopeston, Terre Haute, Vincennes, and Watseka and the Village of Milford, on March 1, 1968, for reconsideration of the order of the Commission, Division 3, dated January 25, 1968, authorizing the above-titled discontinuance; applicant's reply thereto; petitioners' motion to strike certain matter appearing in the reply; and applicant's reply to the motion; and

It appearing, That the order of the Commission, Division 3, acting as an Appellate Division, dated May 8, 1968, and served earlier on May 15, 1968, erroneously indicated that the Commission had granted the petition insofar as it sought dismissal of the above-titled proceeding for failure to properly invoke this Commission's jurisdiction under section 13a(1);

It further appearing, That the matters appearing in the reply to the petition objected to in the motion to strike are not of record in this proceeding and therefore not properly before this Commission as evidence and that no objection is made to the motion to strike;

It further appearing, That in order to invoke the jurisdiction of this Commission under section 13a(1) of the Interstate Commerce Act a carrier must comply with certain requirements, including the posting of notice "in each station, depot, or other facility involved" (49 CFR 43.5 (j)), which notice must contain a "complete description of the present service of the train . . . involved and of the discontinuance or change of operation or service proposed" (49 CFR 43.5(c)); and that the purpose of requiring such notice is to give the travelling public affected the opportunity to protest the proposed discontinuance;

It further appearing, That applicant in the above-titled proceeding gave the proper notice required, as described above; and

It further appearing, That no other new issues are raised or evidence of substance offered to support the request for reconsideration, and good cause has not been shown for granting the relief requested;

It is ordered, That the motion to strike certain matters appearing in applicant's reply to the petition for reconsideration be, and it is hereby, granted;

It is further ordered, That the petition for reconsideration be, and it is hereby, denied in all respects.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

FILED
MAY 5 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 102

CITY OF CHICAGO, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal From the United States District Court for the Northern District of Illinois

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UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal From the United States District Court for the Northern District of Illinois

---

JURISDICTIONAL STATEMENT

City of Chicago, Tennessee Public Service Commission, Public Utilities Commission of Ohio, Alabama Public Service Commission, State of Louisiana, Mississippi Public Service Commission, Kentucky Railroad Commission, The Metropolitan Government of Nashville and Davidson County, Tennessee, Railway Labor Executives' Association and United Transport

Service Employees (AFL-CIO), appeal from the order of the United States District Court for the Northern District of Illinois-Eastern Division, entered January 8, 1969, dismissing appellants' complaint seeking to set aside and to enjoin findings, decisions and orders of the Interstate Commerce Commission (Commission), relating to the discontinuance by Louisville and Nashville Railroad Company (L&N) of its "Hummingbird" passenger trains between Cincinnati, Ohio and New Orleans, La. (927 miles).

The court below dismissed plaintiffs' complaint on the sole ground that an action may not be brought to review any decision or order of the Commission allowing a passenger train discontinuance pursuant to section 13a(1) of the Interstate Commerce Act, 49 U.S.C. § 13a(1).

OPINIONS BELOW

The opinion of the three-judge court for the Northern District of Illinois was entered January 8, 1969, and is reported at *Tennessee Public Service Commission* v. *United States,* 294 F. Supp. 1106. The opinion and order are set forth herein as Appendix A. The opinion incorporates by reference the opinion entered the same day in the "Georgian" train case, attached as Appendix B to the jurisdictional statement in No. ——, October Term 1968, *City of Chicago, et al.* v. *United States.* The case below was heard jointly with *City of Chicago* v. *United States,* 294 F. Supp. 1103.

The report and order of the Interstate Commerce Commission, Division 3, dated September 3 and served September 6, 1968, were entered in its Finance Docket No. 25047, *Louisville & N.R. Co. Discontinuance of*

Trains, and are reported at 333 I.C.C. 720. The report and order are set forth herein as Appendix B.

The order of the Interstate Commerce Commission, Division 3, upon reconsideration was entered October 31 and served November 4, 1968, and is set forth herein as Appendix C.

JURISDICTION

This suit was brought September 6, 1968 in the three-judge court pursuant to 28 U.S.C. § 1336(a), 1398(a), 1651, 2284, 2321-25, 5 U.S.C. § 702, and 49 U.S.C. § 17(9), to annul and to set aside findings, decisions and orders of the Interstate Commerce Commission entered under 49 U.S.C. § 13a(1), dated September 3 and October 31, 1968.

The order and opinion of the district court dismissing the complaint were entered January 8, 1969.

Notice of appeal was filed in the district court for the Northern District of Illinois-Eastern Division on March 6, 1969.

Jurisdiction of the Supreme Court to review this order by direct appeal is conferred by 28 U.S.C. § 1253 and § 2101(b). Jurisdiction specifically for interstate passenger trains under 49 U.S.C. § 13a(1) is sustained by *City of Williamsport* v. *United States,* 273 F. Supp. 899 (M.D. Pa. 1967), 282 F. Supp. 46 (M.D. Pa. 1968), aff'd *per curiam,* 392 U.S. 642 (1968).

STATUTES INVOLVED

The statutes involved in this case are section 13a(1) of the Interstate Commerce Act, 49 U.S.C. § 13a(1), enacted August 12, 1958, 72 Stat. 571, and 28 U.S.C. 1336(a), and are set forth in Appendix A to the juris-

dictional statement in No. , October Term, 1968, *City of Chicago, et al.* v. *United States.*

QUESTION PRESENTED

Do the U.S. District Courts possess jurisdiction to review decisions and orders of the Interstate Commerce Commission, entered under 49 U.S.C. § 13a(1) after hearing and investigation, where the Commission has found that an interstate passenger train, or a part thereof, is not required by the public convenience and necessity and that continued operation thereof would unduly burden interstate or foreign commerce?

STATEMENT

This appeal involves the "Hummingbird" passenger train.[1] The companion appeal involves the "Georgian" passenger train.[2] A description of the joint "Georgian-Hummingbird" passenger train service is contained in No. , October Term, 1968, *City of Chicago* v. *United States,* and is incorporated herein by reference.

When Chicago & Eastern Illinois Railroad Company (C&EI) was permitted by the Commission to discontinue the operation of the "Georgian" between Chicago, Ill. and Evansville, Ind., thus leaving the "Georgian" to operate only between Evansville, Ind. and Atlanta, Ga., the viability of L&N's "Hummingbird" train was in immediate jeopardy, because a large volume of passengers were carried by the "Georgian" between Chicago, Ill. and points south of Nashville,

---

[1] L&N trains Nos. 6 and 7.

[2] C&EI-L&N trains Nos. 93 and 54.

Tenn., which were transferred to the "Hummingbird" train at Nashville, Tenn.

On April 3, 1968 L&N posted and filed notice that it would discontinue the "Hummingbird" over its entire run between Cincinnati, Ohio and New Orleans, La., stating:

> "On February 1, 1968, the Chicago and Eastern Illinois Railroad Company discontinued its passenger trains Nos. 93 and 54 between Chicago, Illinois and Evansville, Indiana, which connected with the L&N passenger trains operating between Evansville, Indiana and Atlanta, Georgia. These latter trains also carried passengers traveling between Chicago, Illinois, stations on the C&EI intermediate to Evansville, Indiana and stations on the L&N served by Nos. 6 and 7 between New Orleans and Nashville, Tennessee. The discontinuance of said C&EI trains resulted in the immediate loss of the bulk of the passenger business handled on trains Nos. 6 and 7 between New Orleans and Cincinnati."

A statement of the subsequent proceedings before the Commission, and the resultant proceedings in the court below, are set forth in the jurisdictional statement in No. , October Term, 1968, *City of Chicago, et al.* v. *United States,* and are incorporated herein by reference.

THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented by this appeal is identical to that presented in No. , October Term, 1968, *City of Chicago, et al.* v. *United States.* The justification presented for the substantiality of that appeal is incorporated herein by reference.

CONCLUSION

Probable jurisdiction should be noted and the judgment below reversed.

Respectfully submitted,

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May 1969

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 68 C 1666

TENNESSEE PUBLIC SERVICE COMMISSION, CITY OF CHICAGO, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, STATE OF LOUISIANA, ALABAMA PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSION OF OHIO, RAILWAY LABOR EXECUTIVES' ASSOCIATION AND UNITED TRANSPORT SERVICE EMPLOYEES (AFL-CIO), *Plaintiffs*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Defendants*.

Memorandum and Order on Motion to Dismiss

Before Knoch, Senior Circuit Judge, and Robson and Perry, District Judges.

Robson, District Judge:

This is a suit to review certain findings and conclusions of the Interstate Commerce Commission. The defendant railroad has moved to dismiss. This court is of the opinion that the motion should be granted.

On April 3, 1968, the Louisville & Nashville Railroad Company ("L & N") gave notice under 49 U.S.C. § 13a(1) that, effective May 7, 1968, its trains numbered 6 and 7 between Cincinnati, Ohio, and New Orleans, Louisiana, would be discontinued. The Interstate Commerce Commission ("Commission"), on April 24, 1968, entered an order requiring the L & N to continue operating trains 6 and 7

pending an investigation by the Commission. After hearings, the Commission terminated its investigation, and on September 3, 1968 (served September 6, 1968) filed a report. This action was filed shortly thereafter, and, on September 9, 1968, a temporary restraining order was entered. After a further hearing, the restraining order was continued until a three-judge court could be convened and a decision rendered. A joint hearing (with *City of Chicago* v. *United States,* 68 C 956) was held on November 4, 1968. The Commission denied a petition for reconsideration on October 31, 1968, thereby making its action administratively final.

The defendant L & N has moved to dismiss on the ground that this court lacks jurisdiction to review the Commission's decision to terminate the investigation of the proposed discontinuance. This issue was discussed at length in the opinion filed today in *City of Chicago* v. *United States,* 68 C 956. A copy of that opinion is attached and the argument on the jurisdictional issue is hereby incorporated by reference. In short, this court is of the opinion that Congress intended to deny judicial review in cases such as the one before this court.

It is therefore ordered that the defendant Louisville and Nashville Railroad Company's motion to dismiss be and it is hereby granted, and the cause is hereby dismissed.

It is further ordered that the temporary restraining order heretofore entered be and it is hereby dissolved.

WIN G. KNOCH
Circuit Judge

J. SAM PERRY
District Judge

EDWIN W. ROBSON
District Judge

January 8, 1969

APPENDIX B

FINANCE DOCKET No. 25047

LOUISVILLE AND NASHVILLE RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 6 AND 7 BETWEEN NEW ORLEANS, LA., AND CINCINNATI, OHIO

Decided September 3, 1968

Upon investigation, found that the continuance of operation by the Louisville and Nashville Railroad Company of its passenger trains Nos. 6 and 7 between New Orleans, La., and Cincinnati, Ohio, is not required by public convenience and necessity and that the continued operation thereof will burden interstate commerce. Investigation discontinued.

Clifford T. Coomes, Charles B. Arendall, Jr., Thomas S. Lawson, Jr., James E. Simpson, David M. Keeble, and *Robert T. McConaughy* for the Louisville and Nashville Railroad Company.

Weldon A. Cousins, Langdon D. Bell, Nat K. Knight, Bennett E. Smith, Robert A. Jones, Eugene W. Ward, James Kenneth Atkins, and *Chester L. Rigsby* for regulatory agencies of the States of Louisiana, Mississippi, Alabama, Tennessee, Kentucky, and Ohio, protestants.

Louis A. Schwartz, Lawrence F. Daspit, Horace Perry, William A. Thompson, Robert E. Kendrick, Rom McGrath, Raymond F. Simon, and *Bernard Rane* for protestants.

S. F. Walker, F. T. Edwards, Olin B. Brooks, Leslie Stifflemire, P. A. Young, Clifford H. Rex, Joe Hester, Henry E. Risner, John B. Mullins, Jr., J. W. Faust, J. G. Griffin, Alex E. Little, Harry T. Smith, W. R. Selby, A. L. Shepherd, and *Robert C. Tyler* for railway labor organizations, protestants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, BUSH, AND DEASON

TUGGLE, *Commissioner:*

Pursuant to the provisions of section 13a(1) of the Interstate Commerce Act, the Louisville and Nashville Railroad Company (L&N), a common carrier by railroad subject to the provisions of part I of the act, filed a notice and statement on April 3, 1968, in which it proposed to discontinue, effective May 7, 1968, the operation of its passenger trains Nos. 6 and 7 operating between New Orleans, La., and Cincinnati, Ohio, a distance of 927 miles. Copies of the notice were served and posted in the manner prescribed by section 13a(1) of the act and related rules and regulations.

Upon receipt of numerous petitions and letters of protest, an investigation of the proposed discontinuance of service was instituted by our order dated April 24, 1968, which required continued operation of the trains for a period not exceeding 4 months beyond the date when the discontinuance would have become effective. Because of the statutory limitaion upon the time available for investigation and decision, the order provided for the omission of a report and recommended order by the hearing examiner and for certification of the record to us for initial decision. Hearings were held at New Orleans, La., Mobile, Montgomery, and Birmingham, Ala., Nashville, Tenn., Louisville, Ky., and Cincinnati, Ohio. Briefs have been filed.

The trains.—Train No. 6 operates northbound daily from New Orleans to Cincinnati departing New Orleans 8:15 a.m. and arriving Cincinnati 8:10 a.m. the next morning. Train No. 7 operates southbound daily from Cincinnati departing Cincinnati 7:40 p.m. and arriving New Orleans 8:10 p.m. the next evening. The schedule of the trains, the points served, and their populations are set forth in appendix A.

Train consists and crews.—The regular consist of northbound train No. 6 is one double-unit diesel locomotive, one coach, one sleeping car, and one baggage-express car, New Orleans to Cincinnati, daily; one dining car, New Orleans to Nashville, daily; one dormitory car, Montgomery to Nashville, daily; one coach, Montgomery to Louisville, 3 days a week; from one to four express cars. Nashville to Cincinnati, 4 days a week; one storage-mail car, Louisville to Cincinnati, 4 days a week; and one mail-express car, Louisville to Cincinnati, 3 days a week.

The regular consist of southbound train No. 7 is one double-unit diesel locomotive, one coach, and one sleeping car, Cincinnati to New Orleans, daily; one or more express cars, Cincinnati to Louisville, at irregular intervals; one storage-mail car, Cincinnati to Nashville, daily; one baggage-mail car, Cincinnati to Montgomery, daily; one mail-express car, Louisville to Nashville, 6 days a week; one express car, Louisville to Nashville, 3 days a week; one coach, Louisville to Montgomery, 3 days a week; one dining car, Nashville to New Orleans, daily; one dormitory car, Nashville to Montgomery, daily; one storage-mail car, one baggage-mail car, and one coach, Montgomery to New Orleans, daily.

The equipment is described as modern and well maintained and the passenger cars are the newest owned by the carrier. The locomotive equipment would be retired and the car equipment transferred to other trains as replacements of older equipment.

Train No. 6 employes 6 engineers, 6 firemen, 5 conductors, 5 flagmen, 2 baggagemen, 2 coach attendants, 3 dining car employees, and a pullman porter for a total of 30 crew members. Train No. 7 employs the same number of employees in each of the same categories except 1 less conductor for a total of 29 crew members.

Other persons required for the operation of the trains include station and terminal employees who sell tickets,

operators and dispatchers charged with actual operation of the trains, yardcrews who form the trains and work on train equipment, car department employees who inspect, maintain, and clean the car equipment, and mechanial employees who maintain the required motor power.

One position in each pullman car would be eliminated; the personnel involved are not employees of the carrier.

Following the proposed discontinuance, the on-train crews would be employed in other services; they all maintain freight seniority and could be used in freight related positions. Those with insufficient seniority might be assigned to extra boards.

Use of passenger service.—In the respective periods of 1966, 1967, and 1968 (the last, annualized on the basis of data for February 1 to April 30, 1968), the passenger miles of the trains were 52,848,271, 48,668,491, and 22,035,336. In the respective periods of November and December 1967, January, February, March, and April 1968, the average number of passengers per train-mile on train No. 6 was 47, 82.6, 54.4, 30.4, 36.4, and 35.7. During the same periods the average number of passengers per train-mile on train No. 7 was 43.3, 85.4, 50.7, 30.9, 31, and 34.3.

Appendix B reflects the daily average "on" and "off" counts at all stations between New Orleans and Cincinnati for a 6-month period November 1, 1967 to April 30, 1968. The symbols (OC) and (L&N byd) refer to passengers transferring from other railroads and passengers transferring to other L&N trains. On train No. 6, the only intermediate points having an average of 8 or more passengers per day "on" or "off" were Pasagoula (10), Mobile (15), Montgomery (24), Birmingham (25), Decatur (8), Nashville (32), and Louisville (12). On train No. 7 the only intermediate points having a daily average of 7 or more were Louisville (20), Bowling Green (15), Nashville (30), Decatur (7), Birmingham (22), Montgomery (20), and Mobile (17).

Alternate transportation.—In addition to the trains proposed for discontinuance, L&N operates daily trains Nos. 8 and 9 (the Pan American) between New Orleans and Cincinnati, serving the same intermediate points, except Rigolets, La., a conditional stop on train No. 7. Train No. 8 departs New Orleans at 8:45 p.m., as compared with train No. 6's morning departure, and arrives Cincinnati at 9:30 p.m., the following evening. Train No. 9 departs Cincinnati 9:15 a.m., as compared with train No. 7's evening departure, and arrives New Orleans 7:55 a.m., the following morning. L&N also operates trains Nos. 15 and 16 (the South Wind) every other day, between Louisville and Montgomery, serving the same intermediate points as its other four trains. In connection with the Penn Central Railroad and the Seaboard Coast Line Railroad, the South Wind provides through service between Chicago, Ill., and certain Florida points, including Miami and St. Petersburg. Through service would remain between New Orleans and Atlanta, Ga., by change of schedule by the Atlanta and West Point Railroad (A&WP) between Atlanta and Montgomery, the latter an interchange point with the L&N, whereby A&WP would connect with L&N train No. 9 rather than with L&N No. 7 as at present.

All L&N stations here involved, except Rigolets, have direct daily bus service between New Orleans and Cincinnati. There are as many as 21 bus schedules between the various points, depending upon the populations.

Daily scheduled airline service is available between Cincinnati, Louisville, Bowling Green, Nashville, Birmingham, Montgomery, Mobile, Pascagoula, Gulfport, Biloxi, and New Orleans.

Official highway maps of the States involved herein indicate numerous combinations of Federal highways including several segments of the interstate system between New Orleans and Cincinnati and the principal intermediate points served by the trains.

Financial data.—The carrier's balance sheet as of March 31, 1968, shows assets of $1,003 million, including current assets of $97.4 million, special funds $4.3 million, investments $34.8 million, total properties less reserves for depreciation and amortization $857.3 million, and other assets and deferred charges $9.1 million. Liabilities were: Current $53.6 million; long-term debt, due within 1 year, $27.7 million; long-term debt, due after 1 year, $407.8 million; reserves $5.8 million; other liabilities and deferred credits $16.6 million; capital stock $123.9 million; capital surplus $22.1 million; and retained income unappropriated $345.4 million. L&N's income statements for the years 1966, 1967, and the first 3 months of 1968, show, respectively, railway operating revenues of $292.2 million, $285.3 million, and $73.5 million; net railway operating income $38.2 million, $31.4 million, and $6.6 million; net income after fixed charges and other deductions $28.5 million, $19.9 million, and $4.9 million.

The carrier's exhibits and testimony, as revised, depicting revenues, expenses, and out-of-pocket losses pertaining to the operation of the trains indicate net losses in 1966, 1967, and the first 4 months of 1968, of $9,318, $505,361, and $309,461, respectively. The estimated net loss for 1968, based on the month of April 1968, is $909,667. Net annual savings to the carrier, systemwise, upon discontinuance of the trains, are estimated to be $1,610,473. Appendix C reflects the actual revenues and expenses for the year 1967 and the first 4 months of 1968 in the first and second columns. The third column reflects the revenues and expenses for the year 1968 based upon the operating results for the month of April 1968. Column four reflects an estimate of the revenues that would be retained on other L&N trains and the added expenses of handling the traffic on other trains. Column five is an estimate of revenues that would be lost and the expenses to be saved by handling the traffic on other trains should the discontinuance of trains Nos. 6 and 7 be approved.

The revenues and costs, as set forth in appendix C, were computed by the carrier in accordance with generally accepted methods previously approved by the Commission as appropriate in train discontinuance cases and are not under dispute.

The operating expenses for 1966, 1967, the first 4 months of 1968, and the projection for the year 1968 were shown on an out-of-pocket basis. Wages of traincrews and enginecrews are the actual wages paid the crews, increased for the appropriate payroll taxes, meals, lodging, vacation, holiday, and health and welfare allowances. Locomotive fuel, water, lubricants and other supplies, locomotive depreciation, and personal injury and livestock damage, are on system averages with appropriate allocations to these trains according to the actual units involved. Dining expenses is the actual cost incurred and pullman deficits are the amounts billed by the Pullman Company.

Locomotive repairs and enginehouse expenses are based on system average unit costs applied to the number of units involved in these trains, decreased by 21 percent for overhead costs which include such items as labor costs and maintenance of facilities which would remain constant even though trains Nos. 6 and 7 were discontinued.

Car repairs and train supplies and expenses are similarly determined and subjected to a 21-percent decrease for overhead costs and elimination of the costs for deadhead cars on trains Nos. 6 and 7. Car depreciation and cost for rental of passenger cars were adjusted to eliminate deadhead equipment.

The joint terminal expenses shown to be avoidable as a result of the discontinuance were computed in the manner approved by the Commission in *Chicago, R. I. & P. R. Co. Discontinuance of Trains,* 328 I.C.C. 278, 286. They include only the amount by which the carrier's share of the total expenses would be diminished by virtue of its lesser use of

the terminals. The costs shown as savable do not include amounts attributable to deadhead equipment carried on trains Nos. 6 and 7 in and out of the terminals.

Evidence in opposition.—Thirty-nine public witnesses appeared at hearings in opposition to the discontinuance of the trains of whom 6 appeared at New Orleans, 9 at Montgomery, 16 at Birmingham, 6 at Nashville, and 2 at Louisville. No public witnesses appeared at Mobile or Cincinnati.

Among those expressing opposition were representatives of United States Congressmen, a representative of the Governor of Alabama, a State legislator, members and representatives of the Public Service Commission of Louisiana, Mississippi, Alabama, and Tennessee, a member of the Kentucky Railroad Commission, mayors, city and county officials, a representative of a college, a mortician, carrier employees, a pullman porter, and members of the public. Of the total witnesses, 14 were past and prospective patrons of the trains.

Public officials opposed the discontinuance of the trains on the stated ground that the economy and the industrial growth in the area is dependent upon continued service by all means of transportation, and particularly rail passenger service. They were also concerned with the general disapperance of passenger trains through discontinuances and the likelihood that all rail passenger service may become extinct. They, regular passengers, and others contend that alternate transportation services are not adequate.

Generally the passenger witnesses testified that at times there were equipment failures, that on time performances were poor, that overcrowding, particularly on weekends and holidays, had occurred, and that the employees were not as courteous as those of other common carriers. Criticism was also directed to a lack of advertising by the car-

rier. On the other hand, several of the patrons praised the carrier as being first class as compared with other railroads. All of such witnesses were desirous of having the trains for their future use and most preferred rail transportation to bus travel and some indicated their fear of air travel.

Discussion and Conclusions

Among factors to be considered in proceedings under section 13a(1) of the act to ascertain whether operation of the passenger trains is required for the public convenience and necessity and will not unduly burden interstate commerce are the population served, the effect on the communities on their route, the extent of the use made by the public of the service sought to be discontinued, alternate transportation service available in the area, the costs incurred and financial losses sustained by the carrier in providing the service under consideration, and the carrier's financial condition. No one of such factors by itself is conclusive or controlling. The burden imposed upon the carrier and upon interstate commerce must be weighed against the need for the service. It is possible that the need for the service under certain circumstances may be so great as to warrant its continuation even at a loss to the carrier. This could arise where the loss of the service would inflict serious injury on the communities, while continuance of the service would impose a relatively slight financial burden on the carrier. The facts in this proceeding do not disclose such an overriding need for the continuance of the involved trains.

L&N began incurring substantial losses on these trains in 1967 ($505,361) even with mail revenues of over $1 million, express revenues over $300,000, and additional revenues from passengers interlined at Evansville, Ind., with Chicago & Eastern Illinois Railroad Co. (C&EI) trains Nos. 93 and 54 and connecting with L&N's trains Nos. 6 and 7 at

Nashville, via intermediate L&N trains Nos. 5 and 10. The C&EI trains were discontinued February 1, 1968, *Chicago & E.I.R. Co. Discontinuance—Chicago & Evansville,* 331 I.C.C. 447.

If the carrier were required to operate the subject trains for another year, it would suffer out-of-pocket losses in excess of $900,000 (computed on the basis of 1968 costs and revenues). Nothing in the record indicates that the deficit could be abated in future years. In addition to the loss of connecting passengers, railway postoffice cars have been eliminated, reducing mail revenues, and on April 1, 1968, railway express (from one to four cars daily) was diverted to truck over the highway.

The full burden of the trains can be better visualized by considering the total economies attainable upon their discontinuance. As shown in appendix C, by retaining a portion of their traffic through diversion to other L&N trains (estimated to produce revenues of $939,500) and incurring thereon costs estimated at $238,700, the carrier could avoid more than $2.3 million of its present costs and thus effect economies in the range of $1.6 million per year. This brings us face to face with the question of whether the public's need for these trains is so great that the nation's private enterprise carrier system must be required to provide for it at an annual out-of-pocket deficit exceeding $900,000 while foregoing the opportunity to effect economies of more than $1.6 million per year.

Before discussing this issue, we turn to a preliminary matter, raised in the briefs filed by the city of Chicago, Ill., and the metropolitan government of Nashville and Davidson County, Tenn., dealing with the decision in *Chicago & E.I.R. Co. Discontinuance—Chicago & Evansville, supra.* These litigants and others have instituted an action in the United States District Court for the Northern District of Illinois, entitled City of Chicago, et al. v United

States, et al., to set aside the said decision of the Commission. The parties here ask that we request L&N to continue the operation of trains Nos. 6 and 7 voluntarily, pending full judicial review of the *C&EI* decision, and, in the event of a refusal by L&N, that we seek a temporary restraining order prohibiting the discontinuance of the trains pending full judicial review.

It is clear that pursuant to the provisions of section 13a(1) of the act, once having entered upon an investigation, we must make the statutory findings needed either to sustain a discontinuance of the investigation, or to support an order requiring continuance of the service within the time limit prescribed by section 13a(1). The evidence before us clearly establishes that the operation of these trains is not required by public convenience and necessity, that the continued operation thereof will unduly burden interstate commerce, and that the investigation should be discontinued; and we so find. Under these circumstances we have no lawful basis for ordering a continuance to await (perhaps longer than a year) developments which, in the end, might or might not change the picture.

The people who have been using the trains for travel have done so largely on an occasional or standby basis. Their primary means of conveyance are the automobile and other nonrail modes. The testimony of the governmental leaders, business representatives, and others is clear proof of that. Many gave opinions about a need for rail passenger service in the interest of community and commercial growth, but few hard, realistic facts were advanced by them in support. On the other hand, the carrier's director of industrial development testified that of 1,726 new industries located on L&N lines in the past 8 years, 843 were at points that had no rail passenger service.

He specified the factors that industry in general considers in selecting a new site—mainly, availability of such things as labor, lower wage rates, lower taxes, utilities,

freight transportation (rail, truck, air and water) economical freight rates, access to raw materials, and cultural facilities—but availability of rail passenger service was not among them. He knew of not a single instance where rail passenger service was even mentioned. This testimony stands uncontroverted by the factual evidence of record.

Even for the individual traveler who calls upon the L&N for his occasional trip, the demand for the service of these trains is minimal. As shown in appendix B, an average of but 2.4 persons per day use train No. 6 for through service from New Orleans to Cincinnati, and only 2 per day use train No. 7 for the through run in the opposite direction. The same is true for the usage to and from the intermediate points: for example, from Mobile, a city of a quarter million, to Birmingham (population 325,000) there are only 4 passengers per day, and to Nashville (population 250,000), only 4 per day.

Local traffic between points on the 490-mile segment between Louisville and Montgomery constitutes a third of the total number of passengers—about 50 of the approximately 150 daily average who board and deboard at the various points along the 927-mile route. This area, which includes Nashville, will continue to have daily service by trains Nos. 8 and 9, the Pan American, and ever-other-day service by trains Nos. 15 and 16, the South Wind. The Pan American will also be available for through passengers and for service at all points on the Hummingbird schedule. Also available are the six daily through schedules each way by bus serving practically all the points on the line, numerous bus runs on segments of the line and airline services heretofore described. From this record we conclude that these alternate services are reasonably adequate to meet the public need for common carrier transportation services. In the face of this conclusion, notwithstanding that some inconvenience to travelers may be encountered at times, we cannot overlook nor disregard the enormous

and ever increasing losses to the carrier. This is plainly a case where there are too many trains for the diminishing needs of the public on this line. With former sources of traffic and revenue unalaterably foreclosed while costs continue their upward spiral, the carrier cannot be expected to continue running a train upward of 1,000 miles each day for service along the way to about 150 persons—many of whom travel only short distances [1]—while subsidizing their travel at the rate of $14.50 out-of-pocket per passenger.

Shippers of express will have adequate service remaining by over-the-highway truck transportation, and by L&N trains Nos. 8 and 9. Buses operating over the highway also render express service. The Post Office Department will continue the mails, including parcel post, to all points by use of airplanes, trucks, and the L&N trains Nos. 8 and 9.

Considering, among other things, the sparing use now made of these long-line trains—not only by travelers, but also by the Post Office Department and shippers of express—the abundance of alternate transportation by rail and other modes and the magnitude of the financial burden which the carrier would have to bear if the trains were continued, this is precisely the kind of circumstance for which Congress designed the relief of section 13a(1). Efforts have been made to have the law amended, including recommentations to Congress by this Commission, to provide a statutory plan for solutions to the passenger train problem under modified criteria. However meritorious Congress may find those efforts to be, they cannot be embraced as elements for decision of the matter now before us. As an administrative agency we are bound by the law as it stands and must be governed by the intendment of Congress in its enactment.

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[1] For example, of the 1,763 boarding at Pascagoula during the 6 months covered by appendix B, 1,497 deboarded at Mobile, 40 miles away.

Employee representatives have requested that appropriate conditions be imposed for protection of employees who may be affected by the discontinuance. It is well established that we have no authority to impose employee protective conditions in a section 13a discontinuance case. The adverse effect of a discontinuance upon employees is a factor to be considered in evaluating public convenience and necessity. Having weighed such factor, we conclude that any possible adverse effect upon the carrier's employees, when considered with all other facts discussed herein, does not justify the findings we would have to make before we could lawfully order continued operation of the involved trains.

Contentions of the parties as to fact or law not specifically discussed herein have been considered and found to be without material significance or not justified.

We find that the operation by the Louisville and Nashville Railroad Company of passenger trains Nos. 6 and 7 between New Orleans, La., and Cincinnati, Ohio, is not required by the public convenience and necessity and that continued operation thereof would unduly burden interstate commerce.

An appropriate order will be entered discontinuing the investigation herein.

COMMISSIONER BUSH concurs in the result.

APPENDIX A

No. 6 Daily (Read down)	Miles		No. 7 Daily (Read up)	Population 1958
8:15 a.m.	0	Lv. New Orleans, La---Ar.	8:10 p.m.	665,000
8:20 a.m.	----	Lv. Carrollton Avenue---Lv.	7:50 p.m.	-------
-------	36	Lv. Rigolets---Lv.	-------	-------
-------	53	Lv. Waveland, Miss---Lv.	-------	1,106
9:29 a.m.	57	Lv. Bay St. Louis---Lv.	6:25 p.m.	5,073
9:51 a.m.	72	Lv. Gulfport---Lv.	6:00 p.m.	33,000
-------	79	Lv. Edgewater Park---Lv.	5:48 p.m.	750
10:07 a.m.	85	Lv. Biloxi---Lv.	5:40 p.m.	47,000
10:31 a.m.	105	Lv. Pascagoula---Lv.	5:10 p.m.	20,800
11:25 a.m.	----	Ar. Mobile, Ala---Lv.	4:15 p.m.	220,000
11:40 a.m.	145	Lv Mobile, Ala---Ar.	3:50 p.m.	-------
-------	169	Bay Minette---Lv.	3:05 p.m.	5,197
12:55 p.m.	----	Ar. Flomaton---Lv.	2:20 p.m.	1,454
1:00 p.m.	205	Lv. Flomaton---Ar.	2:20 p.m.	-------
-------	218	Brewton---Lv.	1:58 p.m.	6,809
-------	243	Evergreen---Lv.	1:28 p.m.	3,703
2:29 p.m.	279	Greenville---Lv.	12:53 p.m.	6,594
3:40 p.m.	----	Ar. Montgomery---Lv.	12:05 p.m.	146,000
4:10 p.m.	323	Lv. Montgomery---Ar.	10:30 a.m.	-------
6:10 p.m.	----	Ar. Birmingham---Lv.	8:15 a.m.	325,000
6:25 p.m.	421	Lv. Birmingham---Ar.	7:45 a.m.	-------
-------	473	Lv. Cullman, Ala---Lv.	-------	11,900
8:15 p.m.	506	Lv. Decatur---Lv.	5:59 a.m.	33,800
10:50 p.m.	----	Ar. Nashville, Tenn---Lv.	3:30 a.m.	250,887
11:35 p.m.	626	Lv. Nashville, Tenn---Ar.	2:25 a.m.	-------
1:00 a.m.	----	Ar. Bowling Green, Ky---Lv.	12:45 a.m.	32,800
1:20 a.m.	699	Lv. Bowling Green Ky---Ar.	12:20 a.m.	-------
2:30 a.m.	771	Lv. Elizabethtown---Lv.	11:06 p.m.	10,900
4:35 a.m.	----	Ar. Louisville---Lv.	11:10 p.m.	392,000
5:00 a.m.	813	Lv. Louisville---Ar.	10:45 p.m.	-------
7:40 a.m	922	Lv. Latonia (Covington)---Lv.	7:58 p.m.	57,000
8:10 a.m.	927	Ar. Cincinnati, Ohio---Lv.	7:40 p.m.	495,500

APPENDIX B

Louisville and Nashville Railroad Company, passengers handled on L&N Train No. 6 for 6 months period, November 1, 1967 to April 30, 1968

From	On	D/A*	Off	D/A*	To Bay St. Louis	Gulfport	Biloxi	Pascagoula	Mobile	Flomaton	Flomaton (L&N byd)	Greenville	Montgomery	Montgomery (OC)	Birmingham	Birmingham (OC)	Cullman	Decatur	Decatur(OC)	Nashville	Nashville (L&N byd)	Bowling Green	Elizabethtown	Louisville	Louisville (OC)	Latonia	Cincinnati	Cincinnati (OC)
New Orleans, La	1,404	18.7	------	-----	345	282	395	171	909	56	12	33	254	--	143	---	6	37	--	236	60	10	4	69	---	---	243	138
New Orleans (OC)	889	4.9	------	-----	4	52	89	16	173	25	58	4	95	35	57	6	1	24	5	38	12	3	3	131	2	---	19	37
Carrollton Avenue	-----	-----	-----	-----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----
Bay St. Louis, Miss	275	1.5	349	1.9	---	188	5	4	20	---	---	---	19	--	11	2	---	1	--	1	12	---	--	----	--	1	4	7
Gulfport, Miss	758	4.2	522	2.9	---	---	229	122	51	1	--	7	36	--	41	31	3	21	--	19	92	1	--	11	--	---	33	60
Biloxi, Miss	1,081	5.9	718	3.9	---	---	---	459	114	2	--	2	85	--	52	46	---	13	--	20	124	---	--	21	--	3	37	105
Pascagoula, Miss	1,763	9.7	772	4.2	---	---	---	---	1,497	10	--	12	31	--	44	25	---	12	--	10	75	---	--	6	1	---	17	23
Mobile, Ala	2,778	15.2	2,764	15.1	---	---	---	---	----	68	7	63	473	1	402	262	30	150	4	71	710	2	2	66	1	---	125	343
Flomaton, Ala	1,033	5.7	162	0.9	---	---	---	---	----	---	--	25	86	--	144	77	14	39	--	59	290	3	8	33	3	---	97	155
Flomaton (L&N byd)	919	5.0	77	0.4	---	---	---	---	----	---	--	3	41	2	119	112	7	14	3	104	239	1	1	26	--	---	49	198
Greenville, Ala	142	2.4	149	0.8	---	---	---	---	----	---	--	---	57	1	125	18	---	16	--	11	64	---	--	12	--	---	43	95
Montgomery, Ala	4,329	23.8	1,175	6.5	---	---	---	---	----	---	---	---	----	--	1,086	280	48	194	3	254	1,303	7	4	143	--	---	366	641
Montgomery (OC)	90	0.5	39	0.2	---	---	---	---	----	---	---	---	----	---	12	---	---	1	--	5	36	---	--	5	1	---	16	14
Birmingham, Ala	4,319	24.8	2,236	12.3	---	---	---	---	----	---	---	---	----	---	----	---	148	166	--	591	1,682	22	22	256	4	1	587	1,040
Birmingham, (OC)	168	0.9	859	4.7	---	---	---	---	----	---	---	---	----	---	----	---	---	---	---	27	26	---	--	6	--	---	21	88
Cullman, Ala	309	1.7	257	1.4	---	---	---	---	----	---	---	---	----	---	----	---	---	5	--	14	219	---	--	15	--	2	23	31
Decatur, Ala	1,594	8.8	693	3.8	---	---	---	---	----	---	---	---	----	---	----	---	---	---	---	102	968	1	11	161	--	2	134	215
Decatur (OC)	-----	-----	15	0.1	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----
Nashville, Tenn	863	4.7	1,562	8.6	---	---	---	---	----	---	---	---	----	---	----	---	---	---	---	----	----	37	7	206	7	4	223	379
Nashville, Tenn (L&N byd)	656	3.6	5,912	32.5	---	---	---	---	----	---	---	---	----	---	----	---	---	---	---	----	----	19	7	328	---	---	148	154
Bowling Green, Ky	266	1.5	106	0.6	---	---	---	---	----	---	---	---	----	---	----	---	---	---	---	----	----	---	3	177	2	1	42	41
Bowling Green, (L&N byd)	1,143	6.3	-----	-----	---	---	---	---	----	---	---	---	----	---	----	---	---	---	---	----	----	---	8	494	1	9	293	338
Elizabethtown, Ky	5	0.1	80	0.4	---	---	---	---	----	---	---	---	----	---	----	---	---	---	---	----	----	---	---	2	---	---	----	3
Louisville, Ky	674	3.7	2,168	11.9	---	---	---	---	----	---	---	---	----	---	----	---	---	---	---	----	----	---	---	----	--	8	293	373
Louisville (OC)	-----	-----	22	0.1	---	---	---	---	----	---	---	---	----	---	----	---	---	---	---	----	----	---	---	----	---	---	----	----
Latonia, Ky	-----	-----	31	0.2	---	---	---	---	----	---	---	---	----	---	----	---	---	---	---	----	----	---	---	----	---	---	----	----
Cincinnati, Ohio	-----	-----	2,811	15.4	---	---	---	---	----	---	---	---	----	---	----	---	---	---	---	----	----	---	---	----	---	---	----	----
Cincinnati (OC)	-----	-----	4,479	24.6	---	---	---	---	----	---	---	---	----	---	----	---	---	---	---	----	----	---	---	----	---	---	----	----
Total	27,958	153.6	27,958	153.6	349	522	718	772	2,764	162	77	149	1,175	39	2,236	859	257	693	15	1,562	5,912	106	80	2,168	22	31	2,811	4,479

*D/A daily average.

Louisville and Nashville Railroad Company, passengers handled on Train No. 7 for 6 months period, November 1, 1967 through April 30, 1968

From	On	D/A*	Off	D/A*	To Louisville	Louisville,(OC)	Elizabethtown	Bowling Green	Bowling Green(L&N byd)	Nashville	Nashville (L&N byd)	Decatur	Decatur(OC)	Cullman	Birmingham	Birmingham (OC)
Cincinnati, Ohio	2,901	15.9	-----	-----	383	--	3	120	366	300	129	106	-	28	498	89
Cincinnati (OC)	3,960	21.8	-----	-----	482	2	3	45	310	285	235	175	2	36	848	81
Latonia, Ky.	36	0.2	-----	-----	14	12	1	3	1	---	---	2	-	2	1	---
Louisville, Ky.	3,531	19.4	879	4.8	---	--	16	1,334	516	195	413	136	1	4	333	68
Louisville (OC)	101	0.6	14	0.1	---	--	--	1	2	10	7	---	-	---	4	---
Elizabethtown, Ky.	73	0.4	23	0.1	---	--	--	26	8	7	12	2	-	---	6	4
Bowling Green, Ky.	117	0.6	1,529	8.4	---	--	--	-----	---	19	40	5	-	1	7	7
Bowling Green (L&N byd)	-----	----	1,203	6.6	---	--	--	-----	---	--	---	---	-	---	---	---
Nashville, Tenn.	464	2.5	816	4.5	---	--	--	-----	---	--	---	26	-	2	142	14
Nashville (L&N byd)	329	1.8	1,179	6.5	---	--	--	-----	---	--	---	727	1	138	1,661	144
Decatur, Ala.	329	1.8	1,179	6.5	---	--	--	-----	---	--	---	---	1	3	51	10
Decatur (OC)	13	0.1	4	0.1	---	--	--	-----	---	--	---	---	-	---	2	4
Cullman, Ala.	49	0.3	214	1.2	---	--	--	-----	---	--	---	---	-	---	7	---
Birmingham, Ala.	1,559	8.6	3,560	19.6	---	--	--	-----	---	--	---	---	-	---	-----	---
Birmingham (OC)	239	1.3	421	2.3	---	--	--	-----	---	--	---	---	-	---	-----	---
Montgomery, Ala.	1,364	7.5	3,601	19.8	---	--	--	-----	---	--	---	---	-	---	-----	---
Montgomery (OC)	3,557	19.5	50	0.3	---	--	--	-----	---	--	---	---	-	---	-----	---
Greenville, Ala.	112	0.6	550	3.0	---	--	--	-----	---	--	---	---	-	---	-----	---
Evergreen, Ala.	12	0.1	117	0.6	---	--	--	-----	---	--	---	---	-	---	-----	---
Brewton, Ala.	100	0.5	142	0.7	---	--	--	-----	---	--	---	---	-	---	-----	---
Flomaton, Ala.	118	0.6	1,044	5.7	---	--	--	-----	---	--	---	---	-	---	-----	---
Flomaton (L&N byd)	81	0.4	777	4.3	---	--	--	-----	---	--	---	---	-	---	-----	---
Bay Minette, Ala.	2	0.1	69	0.4	---	--	--	-----	---	--	---	---	-	---	-----	---
Mobile, Ala.	1,548	8.5	3,117	17.1	---	--	--	-----	---	--	---	---	-	---	-----	---
Pascagoula, Miss.	359	2.0	375	2.1	---	--	--	-----	---	--	---	---	-	---	-----	---
Biloxi, Miss.	534	2.9	785	4.3	---	--	--	-----	---	--	---	---	-	---	-----	---
Edgewater Park, Miss.	-----	----	7	0.1	---	--	--	-----	---	--	---	---	-	---	-----	---
Gulfport, Miss.	435	2.4	641	3.5	---	--	--	-----	---	--	---	---	-	---	-----	---
Bay St. Louis, Miss.	321	1.8	166	0.9	---	--	--	-----	---	--	---	---	-	---	-----	---
Waveland, Miss.	24	0.1	-----	-----	---	--	--	-----	---	--	---	---	-	---	-----	---
Carrollton Avenue	-----	----	4,445	24.4	---	--	--	-----	---	--	---	---	-	---	-----	---
New Orleans, La.	-----	----	944	5.2	---	--	--	-----	---	--	---	---	-	---	-----	---
New Orleans (OC)	-----	----	-----	-----	---	--	--	-----	---	--	---	---	-	---	-----	---
Total	27,508	151.1	27,508	151.1	879	14	23	1,529	1,203	816	836	1,179	4	214	3,560	421

*D/A daily average

Louisville and Nashville Railroad Company, passengers handled on Train No. 7 for 6 months period, November 1, 1967 through April 30, 1968--Continued

From \ To	Montgomery	Montgomery (OC)	Greenville	Evergreen	Brewton	Flomaton	Flomaton (L&N byd)	Bay Minette	Mobile	Pascagoula	Biloxi	Edgewater Park	Gulfport	Bay St. Louis	Waveland	Carrollton Ave.	New Orleans	New Orleans (OC)
Cincinnati, Ohio	325	3	30	9	15	64	35	3	125	16	28	-	22	3	-	-	196	5
Cincinnati (OC)	514	10	81	17	10	117	100	8	286	11	77	-	46	6	-	-	144	29
Latonia, Ky	---	---	---	---	---	---	---	-	---	---	---	-	---	-	-	-	---	---
Louisville, Ky	228	1	3	--	5	33	14	-	64	13	22	-	12	3	-	-	97	20
Louisville (OC)	4	2	--	--	--	2	3	-	3	--	1	-	--	-	-	-	1	61
Elizabethtown, Ky	2	---	---	--	--	1	2	-	1	--	--	-	--	-	-	-	2	--
Bowling Green, Ky	15	---	---	--	--	2	2	-	5	--	1	-	2	-	-	-	9	2
Bowling Green (L&N byd)	---	---	---	--	--	---	---	-	--	--	--	-	--	-	-	-	--	--
Nashville, Tenn	116	2	5	1	1	39	16	2	41	2	9	-	7	-	-	-	24	15
Nashville (L&N byd)	1,379	28	38	21	22	237	209	3	601	69	107	1	97	9	-	-	67	10
Decatur, Ala	94	-	10	7	3	33	7	1	62	14	6	-	10	-	-	-	15	3
Decatur (OC)	2	---	---	--	--	---	1	-	3	--	1	-	--	-	-	-	--	--
Cullman, Ala	25	---	---	--	2	3	---	-	7	1	--	-	2	1	-	-	1	--
Birmingham, Ala	802	---	96	13	4	97	53	11	273	21	38	-	23	4	-	-	112	12
Birmingham (OC)	95	4	11	--	--	18	11	-	62	7	16	-	6	-	-	-	2	7
Montgomery, Ala	---	---	228	8	19	55	45	1	498	30	88	2	53	8	-	-	288	41
Montgomery (OC)	---	---	48	41	61	245	277	32	996	82	255	-	265	40	-	-	875	340
Greenville, Ala	---	---	---	--	--	4	2	-	48	5	3	-	5	-	-	-	36	9
Evergreen, Ala	---	---	---	--	--	1	---	-	--	--	1	-	--	-	-	-	10	--
Brewton, Ala	---	---	---	--	--	93	---	-	2	2	-	-	--	-	-	-	3	--
Flomaton, Ala	---	---	---	--	--	---	---	5	35	6	3	-	6	-	-	-	40	23
Flomaton (L&N byd)	---	---	---	--	--	---	---	3	5	-	4	-	3	-	-	-	27	39
Bay Minette, Ala	---	---	---	--	--	---	---	-	--	--	-	-	--	-	-	-	2	--
Mobile, Ala	---	---	---	--	--	---	---	-	--	96	80	4	47	33	-	-	1,145	143
Pascagoula, Miss	---	---	---	--	--	---	---	-	--	--	45	-	15	7	-	-	261	31
Biloxi, Miss	---	---	---	--	--	---	---	-	--	--	--	-	20	10	-	-	429	75
Edgewater Park, Miss	---	---	---	--	--	---	---	-	--	--	--	-	--	--	-	-	--	--
Gulfport, Miss	---	---	---	--	--	---	---	-	--	--	--	-	--	42	-	-	337	56
Bay St. Louis, Miss	---	---	---	--	--	---	---	-	--	--	--	-	--	--	-	-	317	4
Waveland, Miss	---	---	---	--	--	---	---	-	--	--	--	-	--	--	-	-	5	19
Carrollton Avenue	---	---	---	--	--	---	---	-	--	--	--	-	--	--	-	-	--	--
New Orleans, La	---	---	---	--	--	---	---	-	--	--	--	-	--	--	-	-	--	--
New Orleans (OC)	---	---	---	--	--	---	---	-	--	--	--	-	--	--	-	-	--	--
Total	3,601	50	550	117	142	1,044	777	69	3,117	375	785	7	641	166	-	-	4,445	944

	Year 1967 trains Nos. 6 and 7	First four months 1968 trains Nos. 6 and 7	Annual projection from actual results of April 1968 trains Nos. 6 and 7	Projected year 1968 Estimated revenues retained, expenses not saved from discontinuance of trains Nos. 6 and 7	Estimated revenues loss and expenses saved
Revenues:					
1. Passenger	$1,331,486	$246,925	$740,296	$399,037	$341,259
2. Dining	146,084	28,830	68,518	22,611	45,907
3. U. S. Mail	1,040,985	244,600	753,176	514,912	238,264
4. Express	309,519	52,608	----------	----------	----------
5. Baggage	2,525	1,784	5,817	2,909	2,908
6. Total	2,830,599	574,747	1,567,807	939,469	628,338
Expenses (out-of-pocket):					
7. Wages of train and enginecrews	721,702	229,576	652,530	----------	652,530
8. Locomotive repairs	292,629	91,681	271,699	----------	271,699
9. Locomotive fuel	258,266	80,914	239,785	----------	239,785
10. Locomotive water, lubricants, and other supplies	35,168	11,018	32,652	----------	32,652
11. Locomotive enginehouse expense	54,942	17,214	51,022	----------	51,022
12. Locomotive depreciation	46,008	15,336	46,660	----------	46,660
13. Car repairs	344,155	78,662	209,553	79,063	130,490
14. Car depreciation	23,966	5,268	15,042	8,476	6,566
15. Rent for passenger cars	171,884	26,769	45,565	----------	45,565
16. Train supplies and expenses	278,192	58,296	143,685	42,407	101,278
17. Personal injury and livestock damage	86,526	28,684	86,554	----------	86,554
18. Dining expenses	372,318	86,031	247,379	11,708	235,671
19. Pullman deficit	313,119	62,800	156,628	----------	156,628
20. Cincinnati joint terminal expenses	328,134	89,898	255,618	64,604	191,014
21. Louisville joint terminal expenses	19,960	-------	----------	----------	----------
22. Decatur joint terminal expenses	9,774	2,178	7,363	6,648	------- 715
23. Montgomery joint terminal expenses	30,704	8,704	31,034	17,011	14,023
24. New Orleans joint terminal expenses	92,559	25,115	68,286	8,746	59,540
25. Total	3,480,006	918,144	2,561,055	238,663	2,322,392
26. Net out-of-pocket (Loss) gain	(649,407)	(343,397)	(993,248)	----------	----------
27. Gain from feeder services	144,046	33,936	83,581	----------	----------
28. Net out-of-pocket (Loss) after feeder gain	(505,361)	(309,461)	(909,667)	----------	----------

Expenses—annual projection	2,322,392
Revenues—annual projection	628,338
Savings to L&N Railroad Company	1,694,054
Less projected feeder revenue gain	83,581
Net annual savings to L&N	1,610,473

Order

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 3rd day of September, 1968.

Finance Docket No. 25047

Louisville and Nashville Railroad Company Discontinuance of Trains Nos. 6 and 7 Between New Orleans, La., and Cincinnati, Ohio

Investigation of the matters and things involved in this proceeding having been made pursuant to the order of said division, dated April 24, 1968, a hearing having been held and the said division on the date hereof having made and filed a report containing its findings of fact and conclusions thereon which report is hereby referred to and made a part hereof:

It is ordered, That this investigation be, and it is hereby, discontinued effective 35 days from the date of service of this order.

By the Commission, division 3.

H. Neil Garson,
Secretary.

(seal)

APPENDIX C

Service Date
November 4, 1968

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 31st day of October 1968.

Finance Docket No. 25047

LOUISVILLE AND NASHVILLE RAILROAD COMPANY DISCONTINUANCE OF TRAINS NOS. 6 AND 7 BETWEEN NEW ORLEANS, LA., AND CINCINNATI, OHIO

Upon consideration of the record in the above-entitled proceedings, the petition of Metropolitan Government of Nashville and Davidson County, Tenn., Tennessee Public Service Commission, Alabama Public Service Commission, State of Louisiana and the Cities of Chicago, Ill. and Birmingham and Montgomery, Ala., filed October 7, 1968, seeking reconsideration of the order of Division 3, served September 6, 1968; and the reply of the Louisville and Nashville Railroad Company filed October 9, 1968; and

It appearing, That the petition sets forth no material facts or arguments in addition to those previously considered in the proceeding; that there has been presented no error of fact or law with respect to matters complained of by petitioners; and that no showing has been made warranting reconsideration of said order;

It is ordered, That the petition for reconsideration be, and it is hereby denied.

By the Commission, Division 3, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1363

CITY OF CHICAGO, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 1364

CITY OF CHICAGO, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

These are direct appeals from two final orders of a three-judge district court which, after a joint hearing, dismissed for lack of jurisdiction suits brought by appellants to review determinations of the Interstate Commerce Commission allowing the discontinuance of

352-159—69

certain trains.[1] The United States and the Interstate Commerce Commission believe that this Court has jurisdiction of these appeals and that the judgments below should be reversed and the causes remanded for review of the Commission's determinations on the merits.

In *Chicago & Eastern Illinois Railroad Co.—Discontinuance of Trains, etc.*, 331 I.C.C. 447 (J.S., No. 1363, 8a-35a), the Commission found that the continued operation of Chicago & Eastern Illinois Railroad Company's passenger trains Nos. 93 and 54 between Chicago and Evansville, Indiana, was not required by public convenience and necessity and that continued operation thereof would unduly burden interstate commerce. In *Louisville and Nashville Railroad Company—Discontinuance of Trains, etc.*, 333 I.C.C. 720 (J.S., No. 1364, 3a-24a), the Commission made the same findings with respect to passenger trains Nos. 6 and 7 operated by the Louisville and Nashville Railroad Company between New Orleans and Cincinnati.

Each decision by the Commission followed a hearing in which the appellants participated, and in each case the Commission's decision took the form of an order terminating the investigation of the proposed discontinuance that the Commission had instituted pursuant to Section 13a(1) of the Interstate Commerce Act (49 U.S.C. 13a(1)). Both appeals raise the identi-

[1] The opinion in No. 1363, *City of Chicago* v. *United States*, is reported at 294 F. Supp. 1103 (J.S., No. 1363, 3a–7a). The opinion in No. 1364, *Tennessee Public Service Commission* v. *United States*, is reported at 294 F. Supp. 1106 (J.S., No. 1364, 1a–2a).

cal question whether such an order by the Commission under Section 13a(1), which in effect authorizes a train discontinuance on the basis of findings made after hearing, is a reviewable order within the meaning of 28 U.S.C. 1336(a).[2]

Section 13a(1)[3] permits a railroad to discontinue the operation of an interstate train upon the posting and filing of notice at least 30 days in advance of the proposed discontinuance. During the 30 day period the Commission may institute an investigation of the proposed discontinuance and may require the railroad to continue the operation of the train, "pending hearing and decision in such investigation," for not longer than four months after the proposed discontinuance would have become effective. "If, after hearing in such investigation * * * the Commission finds that the operation of or service of such train * * * is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require [its] continuance * * *" (or restoration, if the four month period has expired) for not more than one year. If the Commission does not require continuance, either with or without such an investigation, the train may be discontinued without regard to any state requirement.

The district courts are divided as to the reviewability of such orders allowing train discontinuances

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[2] 28 U.S.C. 1336(a) provides:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

[3] Set forth in full at J.S., No. 1363, 1a–2a.

following Commission investigations.[4] *State of Minnesota* v. *United States*, 238 F. Supp. 107 (D. Minn.), and *State of New Hampshire* v. *Boston and Maine Corporation*, 251 F. Supp. 421 (D.N.H.), held—like the decisions below—that Commission orders terminating Section 13a(1) investigations after hearing are not "orders" within the meaning of the judicial review statute. These decisions are directly contrary to subsequent decisions of three-judge district courts in *State of Vermont* v. *Boston and Maine Corp.*, 269 F. Supp. 80 (D. Vt.); *City of Williamsport* v. *United States*, 273 F. Supp. 899 (M.D. Pa.);[5] and *State of New York* v. *United States*, N.D.N.Y. No. 67–CV–207, appeal pending, No. 1362, O.T., 1968. And, after the decisions in the instant cases were rendered by the court below, a different panel of three judges in the Northern District of Illinois (Swygert, C. J., Hoffman, and Marovitz, D.JJ.) denied a similar motion to dismiss a suit to review a Commission order of the same kind (*City of Chicago* v. *United States*, N.D. Ill. No. 68 C 2184), thus creating a conflict within the Northern District of Illinois.

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[4] It is settled that a decision of the Commission not to enter into an investigation of a proposed discontinuance is not reviewable, since that decision is committed to the exclusive discretion of the Commission. *State of New Jersey* v. *United States*, 168 F. Supp. 324 (D.N.J.), affirmed *per curiam*, 359 U.S. 27; *Sludden* v. *United States*, 211 F. Supp. 150 (M.D. Pa.); see *Williamsport*, *supra*, 273 F. Supp. at 902, note 5.

[5] The decision in *Williamsport* was interlocutory. Subsequently the court sustained the Commission's order on the merits. 282 F. Supp. 46, affirmed *per curiam*, 392 U.S. 642.

We submit that the reasoning and result of the decisions holding in favor of review are clearly correct, and that the decisions of the court below are in error.

The theory that the district courts lack jurisdiction to review a Commission determination that continuance of train service is not required rests largely on the premise that the statute is "self-implementing" in such a case. See the opinion below in *City of Chicago* v. *United States,* J.S., No. 1363, 5a–7a; *New Hampshire, supra,* 251 F. Supp. at 423–424; *Minnesota, supra,* 238 F. Supp. at 111–112. These cases rely on the fact that the statutory scheme puts the Commission in the position of ordering its investigation terminated—if its findings are that the train is not required—rather than granting any specific authority to the railroad. The railroad derives its authority to discontinue the train, it is said, from the statute itself, and the Commission has done nothing more than decide not to exercise its veto power, as it might have—unreviewably—in failing to initiate the investigation. These cases recognize, however, the railroads' right to judicial review if the Commission orders continuance of the train, because then an affirmative order rather than "non-action" by the Commission is involved. See the opinion below in *City of Chicago* v. *United States,* J.S., No. 1363, 6a; *New Hampshire, supra,* 251 F. Supp. at 425.

Such conceptual reasoning ignores the realities of the situation: Once the Commission has exercised its discretion to conduct an investigation into the merits of the questions whether continuance of a train is re-

quired by the public convenience and necessity and whether it would unduly burden interstate commerce, there is no discretion to decide those questions otherwise than in accordance with law. There is a vital distinction between a decision not to entertain a case and a decision of that case on the merits. Once the Commission decides to rule upon the merits—as it did in these cases—the result obviously turns on which way the Commission resolves the merits, and the fact that the decision is in form one whether or not to let the statute "implement itself" is immaterial. There is no reason to say that an affirmative answer to the statutory questions is an "order" but a negative answer is something else. Either answer is a decision of the case that the Commission has undertaken to hear, and both are equally subject to judicial review.

The reasoning below—and in the other cases that have reached the same result—bears a remarkable resemblance to those early cases, since overruled, which held that courts could review only "affirmative" orders of an agency and could not review "negative" orders. See, *e.g., Lehigh Valley Railroad Company* v. *United States,* 243 U.S. 412; *Proctor & Gamble Company* v. *United States,* 225 U.S. 282. The negative order doctrine was firmly repudiated in *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125. In language that is equally applicable to the instant cases, Mr. Justice Frankfurter stated for the Court (307 U.S. at 142–143):

> An order of the Commission dismissing a complaint on the merits and maintaining the *status*

> *quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. * * * We conclude, therefore, that any distinction, as such, between "negative" and "affirmative" orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding.

Additionally, there is a clear analogy between Section 13a(1) and Section 15(7) of the Act (49 U.S.C. § 15(7)). Under Section 15(7) a Commission decision as to whether to suspend a new rate cannot be judicially reviewed, *Luckenbach Steamship Company* v. *United States,* 179 F. Supp. 605 (D. Del.), modified on other grounds, 364 U.S. 280, just as a decision not to investigate a proposed train discontinuance cannot be reviewed.[6] On the other hand, it is well established that after consideration of the merits by the Commission, its final decision not to set aside a new rate is reviewable. *E.g., Interstate Commerce Commission* v. *Inland Waterways Corp.,* 319 U.S. 671.[7]

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[6] See note 4, *supra.*

[7] The court in *New Hampshire, supra,* erroneously reasoned that Section 13a(1) requires only an "investigation" whereas Section 15(7) requires a "hearing" (251 F. Supp. at 424). However, Section 13a(1) expressly provides that the Commission may require continuance or restore service only "after hearing in such investigation," and thus the two statutory schemes are substantially the same.

There is nothing in Section 13a(1) or its legislative history indicating that Congress intended to deny aggrieved members of the public the right to judicial review where the Commission finds, after a hearing, that continuance of train service is not required.[8] This Court has recently made plain that a Congressional purpose to limit the right to judicial review of final agency action will not be presumed in the absence of clear and convincing evidence of an intention to do so. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136. The Court stated that:

> a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. * * * [T]he Administrative Procedure Act * * * embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a). [387 U.S. at 140.]

Finally, there are strong reasons of policy favoring the right to review Commission decisions, after hearing, which refuse to order the continuance of train

[8] While the Commission has recommended legislation removing any doubt as to the reviewability of orders entered after hearings refusing to continue train service, it has also advised Congress that it reads the existing statute as permitting **judicial review of such orders on complaint of an aggrieved** party. Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce on S. 1175, 90th Cong., 1st Sess., pp. 11–12, 21–24.

service. The decisions below would permit railroads to obtain review of a decision requiring continuance, but would deny that right to parties aggrieved by a contrary decision—no matter how erroneous the Commission's findings might be. This would be manifestly unfair. Cf. *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576. Since Congress has not expressly precluded judicial review of Commission decisions based on findings made after investigation and hearing that continuance of train service is not required, there is no reason for the courts to extinguish that right.

For the foregoing reasons, we agree with the appellants that the decisions of the district court in these cases should be reversed. Accordingly, we urge that probable jurisdiction be noted; alternatively, the Court may deem the cases appropriate for summary reversal.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

CITY OF CHICAGO, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

On Appeal From the United States District Court for the Northern District of Illinois

---

MOTION BY APPELLEE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY TO AFFIRM

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In the
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No. 1363

CITY OF CHICAGO, ET AL.,

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Appellees.

On Appeal From the United States District Court for the Northern District of Illinois

MOTION BY APPELLEE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY TO AFFIRM

Now comes Chicago and Eastern Illinois Railroad Company (C.&E.I.), one of the appellees, and pursuant to Rule 16 of this Court, respectfully moves the Court to affirm the judgment of the trial court in this cause, on the ground that the questions presented by the appeal are so insubstantial as not to require further argument, in support of which motion appellee submits the following brief.

BRIEF OF APPELLEE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY IN SUPPORT OF MOTION TO AFFIRM

May It Please The Court:

The appeal seeks to have this Court recognize a right of objectors to judicial review of the discontinuance of trains undertaken by rail carriers pursuant to Section 13a(1) of the Interstate Commerce Act (49 U.S.C. §13a(1)).

On August 31, 1967, the Chicago and Eastern Illinois Railroad Company (C.&E.I.) filed with the Interstate Commerce Commission (Commission) a notice that the C.&E.I. intended to discontinue its trains Nos. 93 and 94 between Chicago, Illinois, and Evansville, Indiana. The Commission made an investigation and then terminated its investigation without invoking its discretionary authority under Section 13a(1) to require continued operation of the trains for a one-year period.

The trains were discontinued. Appellants then filed an action in the United States District Court for the Northern District of Illinois, seeking a court order requiring the C.&E.I. to reinstate the trains. Appellants claimed that they were seeking judicial review from the order of the Commission discontinuing its investigation. The three-judge court convened to hear the case properly dismissed it for lack of jurisdiction, holding that the discontinuance of the trains resulted, not from any action by the Commission, but from the action of the C.&E.I. pursuant to the authority granted railroads by Section 13a(1)—an action which it had no jurisdiction to review. *City of Chicago* v.

United States of America, 294 F. Supp. 1103 (N.D. Ill. 1969).* We adopt the statement of the case and the persuasive reasoning contained in the district court's opinion.

The judgment of the district court should be affirmed because the court's opinion espouses the only construction of Section 13a(1) which is consistent with the language of the statute, the legislative purpose for its enactment, and the decision of this Court in *Bergen County* v. *United States*, 359 U.S. 27 (1959).**

The Language and Statutory Scheme of Section 13a.

Section 13a, enacted in 1958, is divided into two subsections: 13a(1), which covers interstate trains and is therefore applicable to this case; and 13a(2), which relates to the discontinuance of trains operating within a single state.

Section 13a(1) provides that a carrier which operates an interstate train may discontinue the operation of that train by filing a notice of the proposed discontinuance with the Commission at least 30 days in advance of the effective date of the discontinuance. The statute then unequivocally states:

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* At the same time, the three-judge court dismissed a similar case involving the Louisville & Nashville Railroad Company (L&N) on identical grounds, *Tennessee Public Service Commission* v. *United States*, 294 F. Supp. 1106 (N.D. Ill. 1969), now pending before this Court, *sub nom. City of Chicago* v. *United States, et al.*, No. 1364.

** Affirming, *per curiam*, *State of New Jersey* v. *United States*, 168 F. Supp. 324 (D. N.J. 1958).

> "The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any state, or the decision or order of, or the pendency of any proceeding before, any court or state authority to the contrary notwithstanding."

In other words, the statute confers upon the carrier filing the prescribed notice with the Commission absolute authority to discontinue the train service which is the subject of the notice, except to the extent that the Commission affirmatively intervenes by exercise of the limited discretionary powers granted to it under §13a(1).

Under §13(a)1 the Commission is given authority during the 30-day notice period to commence an investigation of the proposed discontinuance either upon complaint or upon its own initiative. The Commission may require the carrier to continue operation of the train during such investigation, but only for a maximum period of four months. After hearings conducted in the course of the investigation, the Commission may require the continuance or restoration of operation of the train for a maximum period of one year. Certain findings must accompany any order requiring continued train service. If the Commission issues such an order, then at the end of the year, the carrier may again invoke the provisions of §13a(1) by filing a notice as before.

If the Commission decides not to commence an investigation or terminates its investigation without ordering continued operation of the train (the situation presented in the case at bar), the discontinuance of the train takes effect on the authority of the provision of §13a(1) quoted above without the requirement of any affirmative action or approval by the Commission.

These provisions of §13a(1) differ significantly from those of the simultaneously enacted §13a(2), dealing with trains operating within a single state. Section 13a(2) contains no provisions for automatic discontinuance of a train in the absence of intervention by the Commission. Instead, discontinuance in §13a(2) cases can be effected only upon the authority of an express Commission order authorizing the discontinuance, and such an order may be entered only after full hearings and upon the making of certain findings specified in the statute.

In Section 13a(1), in contrast to Section 13a(2), Congress deliberately authorized the discontinuance of interstate trains by unilateral action of the railroads, subject to discretionary and carefully limited power in the Commission to delay these discontinuances. Acceptance of appellants' arguments would ignore the language of §13a(1) and the vital differences between the provisions of §13a(1) and §13a(2), and would make §13a(1) discontinuances dependdent upon Commission approval, as in the case of those under §13a(2). This would amount to a rewriting of the entire statute.

Congress Enacted §13a(1) to Provide An Expeditious Method For Railroads to Discontinue Unneeded and Unprofitable Interstate Trains—Appellants Would Frustrate That Congressional Purpose.

Section 13a(1) is obviously an unusual statute. Its legislative history explains the purpose behind its particular provisions and also answers appellants' complaints of "unfairness."

Prior to the enactment of §13a in 1958, the Commission did not have any jurisdiction over the discontinuance of

individual trains, unless the discontinuance amounted to an "abandonment" of an entire railroad line. Discontinuance was under the jurisdiction of the various state regulatory commissions. Therefore, trains operating in more than one jurisdiction were subject to the frequently conflicting orders of a number of state commissions. As a result of changes in public traffic patterns and habits, many trains operated at substantial, continuous, out-of-pocket losses. Experience had demonstrated that where these outdated trains operated across state lines the carriers could not obtain adequate or prompt redress from state commissions. Inability to discontinue unneeded trains had created a crisis which threatened the economic health of the railroads and frustrated national transportation policy. It is clear from the legislative history that §13a(1) was adopted by Congress to remedy this problem and to provide carriers with a prompt and effective method of discontinuing interstate trains which were unneeded and a burden to the carrier, at the same time reserving to the Interstate Commerce Commission limited discretionary power to delay the discontinuance for specified, short periods of time if the public interest required that action. *Conference Report on the Transportation Act of 1958,* 1958 U.S. Code, Cong. & Admin. News, 3482, 3486-3487. See *City of Chicago* v. *United States,* 294 F. Supp. 1103, 1104-05 (N.D. Ill. 1969); *State of Vermont* v. *Boston and Maine Corp.,* 269 F. Supp. 80, 84 (D. Vt. 1967); *City of Williamsport* v. *United States,* 282 F. Supp. 46, 48 (N.D. Pa. 1968); *People of the State of California* v. *United States,* 258 F. Supp. 950, 953-54 (S.D. Calif. 1966).

The provisions of Section 13a(1) implement the legislative purpose of eliminating delays and red tape in the discontinuance of interstate trains. A discontinuance takes

effect within five months after notice, unless the Commission affirmatively rules, on the merits, that the public interest requires continued operation of the train. Even such an order on the merits is effective for only one year, after which the carrier may start the process again.

But the prompt remedy for distressed railroads intended by the authors of §13a(1) would be completely frustrated by the acceptance of appellants' claims to a right of judicial review and by approval of the procedures they have followed in No. 1364 and other such cases. Typically, immediately after the Commission discontinues its investigation, the opponents of a discontinuance file suit and seek a temporary restraining order requiring continued operation of the train. If a right to judicial review is recognized, a district court is likely to be persuaded by an argument in favor of "maintaining the status quo" by injunction until the matter can be heard on the merits. There then follows: the filing and disposition of the opponents' petition for rehearing before the Commission; completion of the pleadings in Court; action on preliminary motions; filing of extensive briefs on the merits; and, finally, hearing and decision by the three-judge court. In No. 1364, which was argued together with this case in the District Court, more than nine months passed between the carrier's notice of intention to discontinue train service and the actual discontinuance of the train upon the dissolution of the district court's temporary restraining order. Indeed, if the District Court had proceeded to the merits, instead of dismissing the action for lack of jurisdiction, the train would still be operating under the restraining

order (more than a year after the filing of the notice of discontinuance) without any determination on the merits.*

Acceptance of appellants' theories would transform a statute which permits only a five-month delay in a discontinuance, in the absence of a decision on the merits requiring continued service, into a procedure which sanctions delays of 1 to 1½ years, even though both the Commission and the three-judge court ultimately determine that the discontinuance is proper. Such a transformation can only be described as a frustration of the Congressional purpose.

Appellants complain of the supposed "unfairness" of a law permitting the carrier to appeal from an order requiring continued train service but forbidding judicial review of a discontinuance. However, it is obvious, from the language of Section 13a(1), that the statute purposely provides different treatment for the rail carrier seeking a discontinuance and persons objecting to the discontinuance. The reason is obvious from our examination of the legislative purpose behind Section 13a(1). Congress sought to provide a method for accomplishing discontinuance of unneeded and burdensome interstate trains, without undue delay, and yet safeguarding the rights of the public. Congress solved this problem by the procedure set forth in Section 13a(1): discontinuance at the option of the car-

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* This is no isolated instance. See also *City of Williamsport* v. *United States*, 273 F.Supp. 899 (M.D. Pa. 1967), 282 F.Supp. 46 (M.D. Pa. 1968) (Notice of discontinuance—January, 1967, temporary restraining order issued—May, 1967, complaint dismissed on the merits—March, 1968. There is no indication in the opinion that the restraining order was dissolved prior to March, 1968.)

City of Chicago v. *United States*, No. 68 C 2184 (N.D. Ill. 1969) (Notice of discontinuance—June 13-14, 1968, temporary restraining order issued—November 15, 1968, Commission decision affirmed and restraining order dissolved—June 2, 1969.)

rier reserving to the Commission discretionary authority to intervene to protect the public interest, but limiting the Commission's authority to short, specified time periods. Congress did not act unreasonably in affording judicial review to railroads who are compelled by Commission order to continue unprofitable passenger service, while entrusting the interests of municipalities and other objectors to the dedicated and expert personnel of the Commission.

The Only Pertinent Decision of this Court Supports Appellee's Position.

The district court's decision is supported by this Court's holding in *Bergen County* v. *United States*, 359 U.S. 27 (1959),* which rejected a claimed right to judicial review of a train discontinuation under Section 13a(1).

In that case a carrier filed notice of the discontinuance of interstate ferry service pursuant to the provisions of Section 13a(1). The Commission received a number of complaints, but declined to commence an investigation into the discontinuance. Thereafter, the State of New Jersey and the New Jersey Board of Public Utility Commissioners brought an action to set aside the Commission's "order" declining to commence an investigation, praying that the Commission be directed to investigate and make findings and that ferry service be restored in the interim. The plaintiffs, like appellants here, sought judicial review under Section 1336(a) of the Judicial Code and under the Administrative Procedure Act. In short, the factual situation and jurisdictional contentions in *State of New Jersey* v. *United States* are indistinguishable from those in the case at bar, with the single exception that the Com-

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* Affirming *per curiam State of New Jersey* v. *United States*, 168 F. Supp. 324 (D. N.J. 1958).

mission in that case declined to make an investigation, while in this case the Commission made an investigation but then terminated it and refused to require continued operation of the trains.

In *State of New Jersey* v. *United States,* the District Court emphatically rejected all of the contentions of the plaintiffs in that case, sustaining the constitutionality of Section 13a(1), and holding that the Federal Courts had no jurisdiction to review the discontinuance or the Commission's refusal to investigate it. With respect to the claim that jurisdiction existed under Section 1336(a) of the Judicial Code, the Court stated (168 F. Supp. at 328-29):

> "We find no jurisdiction under 28 U.S.C. §1336 (1952), because the action is not one to 'enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.' On the contrary, the plaintiffs complain of the refusal of the Commission to act, i.e., 'to enter upon an investigation of the complaint' of the plaintiffs. No 'order' of the Commission is here complained of. Its written notice that it would not investigate the complaint does not constitute such action as is reviewable under §1336, supra . . . ."

> "The notice given by the Commission in the present case by way of response to the plaintiffs' complaint was nothing other than an announcement that the Commission intended to take no action with respect to the railroad's notice of intention to discontinue the ferries. . . . . The Act is self-implementing insofar as it affords authorization to a carrier to discontinue service. No provision is made for any action of the Commission to render such authorization effective. The efficacy of the congressional authorization is in no respect dependent upon any action on the part of the Commission. Obviously, therefore, the provisions of 28 U.S.C. §1336 do not clothe us with jurisdiction here."

This Court affirmed *per curiam* the dismissal of the complaint. *Bergen County* v. *United States*, 359 U.S. 27 (1959). That decision has never been overruled or even questioned by any Court.* It was properly followed by the trial court in the case at bar and by two other well-considered district court decisions which are squarely in point. *State of New Hampshire* v. *Boston & Maine Corp.*, 251 F. Supp. 421 (D.N.H. 1965); *State of Minnesota* v. *United States*, 238 F. Supp. 107 (D. Minn. 1965).

Appellants attempt to rebut the authority of *Bergen County* v. *United States, supra*, by two arguments. Neither can withstand analysis.

First, appellants suggest that this Court's *per curiam* affirmance, on the merits, of a lower Court decision upholding the propriety of a train discontinuation under Section 13a(1) somehow constitutes a holding on the jurisdictional question presented here. *City of Williamsport* v. *United States*, 282 F. Supp. 46 (Md.Pa. 1968), *affirmed per curiam* 392 U.S. 642 (1968). This contention is unsound for two reasons:

First, and most important, no party in the *Williamsport* case questioned jurisdiction in this Court. Therefore, the affirmance does not constitute a precedent on the question of jurisdiction. In *United States* v. *L. A. Tucker Truck-lines*, 344 U.S. 33 (1952), a case involving judicial review of an action of the Interstate Commerce Commission, this

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* Appellants now assert that they did not concede the correctness of the holding in *Bergen County* v. *United States*. Certainly they never contested the correctness of that decision in the trial court, nor do they now attack it directly. If such an attack were made, it would find no support in any existing decision.

Court rejected the type of argument made by appellants here stating (344 U.S. at page 38):

> ". . . The effect of the omission was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point. Even as to our own judicial power or jurisdiction, this Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio.*"

Second, the *City of Williamsport* case is factually distinguishable from the case at bar. In *City of Williamsport*, the Commission did not discontinue its investigation without taking any action. It required the carrier to continue operation of trains between Baltimore, Maryland and Harrisburg, Pennsylvania for the one-year period permitted by Section 13a(1), but declined to interfere with the discontinuance of the portion of the trains which operated between Harrisburg, Pennsylvania, and Buffalo, New York. Thus, the Commission had partially exercised its authority under Section 13a(1). It might be argued that this action made the entire proceedings and all issues in the case subject to judicial review. Certainly jurisdiction in *City of Williamsport* could be sustained on the basis of the particular facts of the case, even though the district court chose not to rely upon these factual differences.

Appellants also seek to distinguish *Bergen County* v. *United States, supra*, on the grounds:

(1) That in *Bergen County*, the Commission refused to investigate the discontinuance while in this case, an investigation was made but discontinued; and

(2) That no opinion or findings were issued by the Commission in *Bergen County,* while the Commission in the case at bar issued an opinion explaining its reasons for not interfering with the discontinuance.

Neither of these distinctions have any substance. In both *Bergen County* and the case at bar the parties objecting to a discontinuance were refused relief by the Commission and sought to appeal to the Courts. If any distinction could be made, the procedure in *Bergen County* of denying relief without an investigation or opinion would seem more objectionable than the careful and deliberate procedures followed by the Commission in the case at bar. Consequently the authority of the *Bergen County* case is a further answer to Appellants' contentions that the trial court "unfairly" denied them judicial review which would be available to others in like circumstances.

Appellants attempt to support their claim that denial of judicial review prior to investigation is proper, but improper after investigation, by a claim that this distinction is common in administrative law. However, as in the trial court, appellants can suggest only one example of this supposed common rule—that relating to reduced freight rates under Section 15(7) of the Interstate Commerce Act. This analogy has been argued before and was carefully considered and rejected in *State of New Hampshire* v. *Boston & Maine Corp.* 251 F. Supp. 421, 424-425 (D.N.H. 1965). The critical difference between Sections 13a(1) and 15(7) is that under Section 15(7) the Commission must determine the lawfulness of proposed rates before they finally become effective, whereas discontinuances under Section 13a(1) are self-implementing unless the Commission intervenes.

Appellants' alternative argument, emphasizing the distinction between a case in which the Commission issues an opinion and findings and the case where none are issued is equally unsound. This argument would make the right to judicial review dependent upon the voluntary and possibly arbitrary decision of the Commission as to whether to prepare or not prepare an opinion. This argument would suggest that Appellants would concede that a right to judicial review would not exist if the Commission had discontinued its investigation in the case at bar without issuing an opinion. Neither precedent nor common sense supports that theory.

The principles of *Bergen County* v. *United States, supra,* control the issues in this case and the authority of that decision requires affirmance here.

The Commission's Attempts to Amend Section 13a(1).

The Commission has attempted to induce Congress to enact an amendment to Section 13a(1), which would give parties objecting to discontinuance, the right to judicial review. This attempt to change the law by new legislation indicates that such judicial review is not provided in the existing form of the statute.

As we have already noted, the language and interrelated structures of Sections 13a(1) and 13a(2) preclude judicial review of Section 13a(1) discontinuances. Any change of such a fundamental nature would require a complete rewriting of the statute—a task properly left to Congress, rather than the courts.

The Jurisdictional Statutes Relied Upon by Appellants are not Applicable In this Case.

Appellants attempt to strengthen their case by claiming a right of judicial review under Section 1336(a) of the Judicial Code, providing for review of "orders" of the Interstate Commerce Commission (28 U.S.C. §1336(a)) and the Administrative Procedure Act (5 U.S.C. §§701-706), providing generally for the review of actions of administrative agencies. But in view of the matters already discussed, neither of these statutes is applicable in this case. Both were relied upon in *State of New Jersey* v. *United States,* 168 F.Supp. 324, 328-329 (D.N.J. 1958), *affirmed per curiam sub nom. Bergen County* v. *United States,* 359 U.S. 27 (1959), *supra,* which denied the existence of any jurisdiction for judicial review by objectors in such cases.

As was made clear in *State of New Jersey* v. *United States* (See p. 10, *supra*), the mere description of the Commission's action in this case as an "order" does not make the Commission's termination of its investigation an "order" as to which judicial review is available under Section 1336(a). As this Court held in *United States* v. *Los Angeles & S.L.R.R.,* 273 U.S. 299, 309-310 (1927):

> "The final report * * * called an order. But there are many orders of the Commission which are not judicially reviewable * * *.
>
> "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future

> status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation."

As for the Administrative Procedure Act, that statute expressly excepts from judicial review cases in which:

> "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." (5 U.S.C. §701).

Both of these exceptions are obviously applicable in the case at bar. The legislative purpose of Section 13a(1), the unusual procedures specifically prescribed by that section and the critical differences between the language and procedures under Section 13a(1) and those required under Section 13a(2) do spell out a legislative pattern which is inconsistent with the time-consuming procedures involved in judicial review. Also it is obvious that the exercise of the limited powers conferred upon the Commission under Section 13a(1) is left wholly to the discretion of the Commission. Consequently, the Administrative Procedure Act does not confer jurisdiction in this case. *State of New Jersey* v. *United States,* 168 F.Supp. 324, 329 (D.N.J. 1958), *affirmed sub nom. Bergen County* v. *United States,* 359 U.S. 27 (1959); *State of New Hampshire* v. *Boston and Maine Corp.,* 251 F.Supp. 421, 424-25 (D.N.H. 1965). No case has sustained jurisdiction to review a Section 13a(1) train discontinuance on the basis of the Administrative Procedure Act.

Conclusion

The decision of the lower court follows the only interpretation of Section 13a(1) which is consistent with the language and scheme of the statute and its legislative history. This decision, like the lower court decision in *State of New Jersey* v. *United States, supra,* should be summarily affirmed. Appellee has so moved, and its motion should be granted.

Respectfully submitted,

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Date: June 3, 1969.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. ~~1064~~ 102

CITY OF CHICAGO, ET AL., - - - Appellants,

versus

UNITED STATES OF AMERICA, ET AL., - Appellees.

On Appeal From the United States District Court for the Northern District of Illinois.

MOTION TO AFFIRM AND BRIEF IN SUPPORT OF THE MOTION.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1364

CITY OF CHICAGO, ET AL., - - - *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO AFFIRM AND BRIEF IN SUPPORT OF THE MOTION.

I

THE MOTION.

Appellee, Louisville and Nashville Railroad Company (hereinafter referred to as L&N), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment of the district court be affirmed on the ground that the question presented is so insubstantial as not to warrant further argument.

II

BRIEF IN SUPPORT OF THE MOTION.

Preliminary Statement.

Appellants attack an order of the court below in which that court dismissed the complaint of appellants for the reason that the court had no jurisdiction to review an order of the Interstate Commerce Commission discontinuing an investigation conducted by the Commission under Section 13a(1) of the Interstate Commerce Act [49 U.S.C.A. 13a(1)].

This case involves the discontinuance by the L&N of its passenger trains Nos. 6 and 7 which formerly operated between Cincinnati, Ohio, and New Orleans, Louisiana. Those trains connected with another pair of L&N passenger trains operating between Evansville, Indiana, and Atlanta, Georgia, Nos. 3 and 4, which in turn connected with passenger trains Nos. 54 and 93 of the Chicago and Eastern Illinois Railroad Company (C&EI) which operated between Chicago, Illinois, and Evansville, Indiana.*

On April 3, 1968, the L&N gave notice to the Commission, pursuant to Section 13a(1) of the Act, that, effective May 7, 1968, it would discontinue operations of passenger trains Nos. 6 and 7. The Commission on April 24, 1968, instituted an investigation into such discontinuance, the effect of which was to require the L&N to continue operation of Nos. 6 and 7 for a maximum period of four months beyond the May 7, 1968

*The discontinuance by C&EI of its trains Nos. 54 and 93 is involved in No. 1363 before this Court.

date. After hearing, the Commission, by order served September 6, 1968, discontinued its investigation, but, on that day and before L&N discontinued operation of Nos. 6 and 7, some of the appellants herein filed a complaint in the court below and sought and obtained a temporary restraining order, requiring L&N to continue operation of the trains until further order of the court.*

On January 8, 1969, the court below dissolved that restraint and dismissed the complaint, and, on the same day, refused to reimpose the restraining order pending the hearing of the appeal to this Court.

On the following day, January 9, 1969, appellants applied to Mr. Justice Marshall for a stay, which was denied by him on January 13, 1969.

Thereafter, notice of appeal was filed, and on May 5, 1969, appellants filed their jurisdictional statement (copy of which was received by L&N on May 7, 1969), raising the issue of whether an order of the Commission discontinuing an investigation under Section 13a(1) of the Interstate Commerce Act is subject to judicial review.

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*The effect of the restraining order of the court below was to extend beyond the statutory four-month suspension period the date for the discontinuance of trains Nos. 6 and 7. Cf. *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963).

THE QUESTION PRESENTED IS NOT SUBSTANTIAL.

A. Commission Jurisdiction is Discretionary and Quite Restricted.

The Commission, before enactment of Section 13a(1) of the Interstate Commerce Act in 1958, had no jurisdiction over the discontinuance of interstate passenger trains, and railroads seeking to discontinue unneeded and unprofitable trains were faced with the piecemeal approach of seeking authority to do so from the regulatory bodies in each of the states through which the trains operated. Relief from state commissions was often difficult to obtain and time-consuming; accordingly, the railroads, in financial straits in the 1950's, were often prevented unnecessarily by state commissions from eliminating unneeded and costly passenger trains H. Rep. No. 1922, 85th Cong. 2d Sess. (1958), 1958 U. S. Code Cong. and Admin. News, p. 3468.

Against this background and to permit carriers promptly and effectively to discontinue unneeded services, Section 13a(1) was included in the Transportation Act of 1958, giving to the Commission, for the first time, authority over the discontinuance of interstate passenger trains.*

That authority is, however, discretionary and quite restricted. Section 13a(1) provides in essence that a carrier operating an interstate passenger train may discontinue that train by filing a notice and statement

*The Transportation Act of 1958 also added Section 13a(2), later discussed, giving to the Commission jurisdiction over intrastate passenger trains under certain circumstances.

with the Commission at least thirty days before the date of the proposed discontinuance.

The carriers then may discontinue the service on the effective date of the notice, "except as otherwise ordered by the Commission." The Commission is given authority to institute an investigation during the thirty-day period, and it *may* require the carrier to continue operation of the train pending hearing and decision in such investigation *for a maximum period of four months.* After hearing in such investigation, the Commission *may,* if it finds that the public and necessity require and interstate or foreign commerce is not unduly burdened, require continued operation for a maximum period of one year. If the Commission issues such an order then, at the end of the year, its jurisdiction ceases, but the carrier may start over before the Commission, again invoking the provisions of Section 13a(1) in the manner discussed.

If the Commission elects *not* to conduct an investigation, the carriers can eliminate the trains on the scheduled date without any affirmative action or approval from the Commission. Such decision is not subject to judicial review. *Bergen County* v. *United States,* 359 U. S. 27 (1959).

Appellants contend that it is "patently unfair" to deny judicial review of their case (Juris. St. in No. 1363, pp. 11, 12). In response to that contention, it is sufficient to point out that the states and communities do not have a right to judicial review of an order under Section 13a(1) where the Commission refuses to in-

vestigate the discontinuance. Obviously, the alleged interest of states and communities is as prominent in the circumstance where the Commission does not investigate as where it does. Accordingly, there is no basis for appellants to contend, as they do, that they are entitled to judicial review simply in the interest of "fairness."

Congress did not see fit to allow judicial review at the instance of protesting states and communities. Otherwise, the railroads would again be faced with the same kind of lengthy and costly delays in eliminating unneeded passenger trains, an abuse which Congress corrected in enacting Section 13a(1). The legislative scheme is, therefore, clearly one for which no judicial review was contemplated.

The statute is self-implementing, authorizing a carrier to discontinue service without any action on the part of the Commission. It is the statute, not the Commission, which authorizes the discontinuance. The only substantive power over a discontinuance which the Commission has under Section 13a(1) is that it *may* require the carrier to continue to operate for one year if, after investigation, the Commission, in the exercise of its sole discretion, finds that such one-year continuance is required by public convenience and necessity and will not unduly burden interstate or foreign commerce.

The provisions of Section 13a(1), therefore, are clear and, as written, that section does not permit appellants to obtain judicial review.

B. Congress Did Not Intend to Permit Judicial Review of An Order Discontinuing an Investigation Under Section 13a(1).

As we have shown, the self-implementing nature of the provisions of Section 13a(1), as written by Congress, do not support appellants' argument that they are to be granted judicial review. Furthermore, comparisons of Section 13a(1) with other provisions of the Interstate Commerce Act and with recent legislative proposals concerning passenger train discontinuances establish that Congress never intended such review.

In this regard it is well to compare Section 13a(1) with other provisions in the Act—Section 1(18)-(22) [49 U.S.C.A. 1(18)-(22)], for example, since those provisions were under consideration by Congress when Section 13a(1) was enacted (please see H. Rep. No. 1922, 85th Cong., 2nd Session (1958), 1958 U. S. Code Cong. and Admin. News, p. 3468). Section 1(18)-(22) deals with, among other subjects, the abandonment of a line of railroad. It provides that no carrier *shall* abandon a line of railroad unless and until there *shall* first have been obtained from the Commission a certificate that the present or future public convenience and necessity *permit* of such abandonment. In other words, a railroad receives no right from the statute to abandon a line of railroad. Congress has delegated to the Commission the authority to decide, under certain standards, whether or not a line should be abandoned, and until the authority is granted to the railroad, it cannot abandon the line. In addition to the right of an inter-

ested party to seek and obtain judicial review of an abandonment order of the Commission, the statute provides for injunctive relief at the suit of the United States, the Commission, a state regulatory body or "any party in interest," to prevent any abandonment of a line of railroad without Commission authority.

Obviously, in enacting Section 13a(1), Congress could have followed the legislative principles embodied in Section 1(18)-(22), delegating to the Commission complete authority to pass on each proposed train discontinuance and making it unlawful for any railroad to discontinue a train unless and until the Commission authorized such discontinuance. Had Congress done so, there would be no question that the train discontinuance would have been subject to judicial review. Congress, however, in enacting Section 13a(1) did not see fit to follow this pattern, obviously for the reason that it was seeking to expedite train discontinuances and to avoid the needless delays formerly experienced by the railroads in proceeding before state regulatory bodies. Congress did not wish to force the railroads to be bogged down in endless administrative proceedings before the Commission and later in the courts in discontinuing unneeded passenger trains that were draining the revenues of the carriers.

In addition, if Congress had intended that an order of the Commission discontinuing an investigation under Section 13a(1) be subject to judicial review, it would have tracked the language which Congress used when it enacted Section 13a(2), the latter statute dealing

with the discontinuance of intrastate passenger trains and having been enacted at the same time as Section 13a(1). Section 13a(2) contains no provision for automatic discontinuance of a train. It requires a carrier to apply to the Commission for authority to effect discontinuance, but permits such application only if the discontinuance is forbidden by state law or by the state commission or if the state commission has not acted promptly. Discontinuance of a train under the provisions of Section 13a(2) cannot be effected unless and until the Commission expressly authorizes the discontinuance by appropriate order. Such order may be entered only after full hearing and upon the making of certain findings specified in the statute. Thus, it is plain that Congress took a sharply different approach in enacting Section 13a(1), permitting automatic statutory discontinuance by the carrier, and Section 13a(2), requiring prior Commission approval, after hearing and appropriate findings, for such discontinuance.

That Congress did not intend judicial review of an order of discontinuance under Section 13a(1) is further supported by this Court's decision in *Bergen County* v. *United States,* 359 U. S. 27 (1959). That case involved the discontinuance of passenger ferries by railroad under the provisions of Section 13a(1). Appropriate notice of discontinuance was filed by the carrier, and protests were lodged by the State of New Jersey and its regulatory body with the Commission. The Commission, in the exercise of its discretion, did not investigate, issuing a written notice to the parties to that effect, and the ferries were discontinued

in accordance with the railroad's thirty-day notice. A complaint was filed by New Jersey and others seeking to set aside the Commission's notice and to require the Commission to investigate the discontinuance. The lower court denied the complaint in *State of New Jersey* v. *United States,* 168 F. Supp. 324 (D., N. J., 1959), on the grounds that Section 13a(1) did not permit judicial review. That decision was affirmed *per curiam* in the *Bergen* case.

Accordingly, this Court recognizes that (1) no judicial review is allowed if no investigation is ordered by the Commission, and, following the rationale of the district court's opinion in the *New Jersey* case, (2) no judicial review would presumably be allowed by this Court if the Commission issues no order discontinuing the investigation after an investigation during the four-month suspension period. In other words, if the Commission, after conducting an investigation, should not have issued any order either continuing the train's operation for one year or terminating the investigation, the train would be discontinued by operation of the statute. No judicial review of such inaction is available.

Therefore, it would indeed be a strained interpretation of the Congressional intent, if (3) judicial review were permitted, simply because the Commission issued an order discontinuing the investigation, when otherwise no judicial review could be obtained.

It is also significant to note that a number of bills related to passenger train discontinuances have been

introduced in Congress since the enactment of Section 13a(1) containing provision for judicial review. For example, H. R. 18212 and S. 3861 introduced in June of 1968 in the second session of the 90th Congress each contained the following provision:

> "13a(3) Any State, administrative or regulatory agency of a State, or person, adversely affected or aggrieved by an order of the Commission entered pursuant to paragraph (1) or (2) of this section, may bring suit to obtain judicial review thereof under those provisions of law applicable in the case of suits to enjoin, suspend, or set aside orders of the Commission."

Obviously, therefore, if existing law provides for judicial review of a Commission order discontinuing an investigation under Section 13a(1), there would be no need whatever to add the above quoted language to the statute.

If Congress had provided for judicial review, it can safely be assumed that in every instance where a train was discontinued under the provisions of Section 13a(1), and notwithstanding the unneeded and losing nature of the particular service being performed, the matter would be taken to court and the trains would likely be operating while the judicial processes are exhausted. Such a provision in the law, however, would have been directly contrary to the circumstances leading up to, and the purpose of, the enactment of Section 13a(1). Needless delays which the railroads formerly experienced in proceedings before state regulatory

bodies would simply have been transferred to the federal courts without any concomitant benefit to the railroads or to the public which rely on them for needed transportation services.

C. Section 10 of the Administrative Procedure Act Further Nullifies Appellants' Claim for Judicial Review.

In 1958, when Congress enacted Section 13a(1) of the Interstate Commerce Act, it did so with full knowledge of the provisions of Section 10 of the Administrative Procedure Act [5 U.S.C.A. 701], the introductory clause of which further narrows the scope of judicial review of agency action. In pertinent part, Section 10 provides:

> "(a) This chapter applies, according to the provisions thereof, except to the extent that . . . (2) agency action is committed to agency discretion by law."

Accordingly, as Professor Davis has stated in *Administrative Law Treatise,* Vol. 4, Section 28.16, p. 80:

> "All of section 10 of the Administrative Procedure Act, dealing with judicial review, is modified by the two parts of the introductory clause, one part of which is: 'Except so far as . . . agency action is by law committed to agency discretion—. . . ' Whatever the scope of review prescribed by subsection (e) when read alone, the scope of review is narrowed by the introductory clause to the extent that the action is by law committed to agency discretion. For instance, although subsection (e) provides that the review-

ing court shall set aside agency action found to be 'arbitrary [or] capricious,' the reviewing court may not set aside arbitrary or capricious action so far as agency action is by law committed to agency discretion. All other clauses of subsection (e) and of the rest of section 10 are similarly modified by the introductory clause."

To the limited extent that Congress granted the Commission power to act in passenger train discontinuances, such power is, unquestionably, committed to the sole discretion of the Commission and, consequently, the exercise of that discretion is not subject to judicial review. Section 13a(1) grants complete discretion to the Commission to determine whether or not an investigation shall be conducted. If an investigation is held, then, again, the Commission has complete discretion to decide whether or not the railroad is to be required to operate the trains for another year, basing such decision, where continuance is required, on the grounds that continued operation for one year would not constitute a burden on interstate or foreign commerce.

It is difficult to imagine any statute where the subject matter is more clearly and completely committed to agency discretion. The commitment to the Commission's discretion under Section 13a(1) is similar to the Commission's discretion in the matter of suspension of rates which, when exercised, is not subject to judicial review. *Arrow Trans. Co.* v. *Southern R. Co.*, 372 U. S. 658.

CONCLUSION.

Since the appellants present no substantial question for the decision of this Court, the final judgment of the district court should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 101

CITY OF CHICAGO, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 102

CITY OF CHICAGO, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court in No. 101 (A. 10–14) is reported as *City of Chicago* v. *United*

States, 294 F. Supp. 1103. The report of Division 3 of the Interstate Commerce Commission in that case (A. 19–40) appears at 331 I.C.C. 447. The opinion of the district court in No. 102 (A. 15–16) is reported as *Tennessee Public Service Commission* v. *United States,* 294 F. Supp. 1106. The report of Division 3 of the Interstate Commerce Commission in that case (A. 48–66) appears at 333 I.C.C. 720.

JURISDICTION

The judgments of the district courts in both cases (A. 14, 16), were entered January 8, 1969. The notices of appeal were filed March 6, 1969, probable jurisdiction in both cases was noted June 16, 1969, and the cases were consolidated. The jurisdiction of this Court to review the judgments below on direct appeal is conferred by 28 U.S.C. 1253 and 2325. *United States* v. *Drum,* 368 U.S. 370; *Dixie Carriers, Inc.* v. *United States,* 351 U.S. 56.

QUESTION PRESENTED

Whether the Interstate Commerce Commission's findings and decision after hearing, allowing discontinuance of a railroad train pursuant to Section 13a(1) of the Interstate Commerce Act, are judicially reviewable upon the complaint of interested parties objecting to loss of service.

STATUTES INVOLVED

Section 13a of the Interstate Commerce Act, as added by Section 5 of the Transportation Act of 1958, 72 Stat. 571, 49 U.S.C. 13a, provides:

> (1) A carrier or carriers subject to this chapter, if their rights with respect to the discon-

tinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one state to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by orders served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in

operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

(2) Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this chapter, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or

where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph.

359-159—69——2

28 U.S.C. 1336(a) provides:

> Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

The introductory clause of the Administrative Procedure Act, as revised, 5 U.S.C. (Supp. IV) 701(a), provides:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
> (1) statutes preclude judicial review; or
> (2) agency action is committed to agency discretion by law.

Section 10(a) of the Administrative Procedure Act, as revised, 5 U.S.C. (Supp. IV) 702, provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

STATEMENT

These are direct appeals from two final orders of a three-judge district court which, after a joint hearing, dismissed for lack of jurisdiction suits brought by appellants to review decisions of the Interstate Commerce Commission allowing the appellee railroads to discontinue certain trains.

Each decision by the Commission followed a hearing and took the form of an order terminating a

Commission investigation of the proposed discontinuance, instituted pursuant to Section 13a(1) of the Interstate Commerce Act (49 U.S.C. 13a(1)). In *Chicago & Eastern Illinois Railroad Co.—Discontinuance of Trains, etc.*, 331 I.C.C. 447 (No. 101, A. 19–40), the Commission found that the continued operation of Chicago & Eastern Illinois Railroad Company's passenger trains Nos. 93 and 54 between Chicago and Evansville, Indiana, was not required by public convenience and necessity and that continued operation thereof would unduly burden interstate commerce. In *Louisville and Nashville Railroad Company—Discontinuance of Trains, etc.*, 333 I.C.C. 720 (No. 102, A. 48–66), the Commission made the same findings with respect to passenger trains Nos. 6 and 7 operated by the Louisville and Nashville Railroad Company between New Orleans and Cincinnati.

The appellants in No. 101 instituted an action before a three-judge court in the Northern District of Illinois seeking review of the Commission's decision with respect to the Chicago & Eastern Illinois discontinuance, and the appellants in No. 102 instituted a separate but similar action before the same three-judge court with respect to the Louisville & Nashville discontinuance. All of the appellants—which are cities, state regulatory agencies and other interested parties—had been parties to the Commission proceedings sought to be reviewed. The defendant railroads objected that the nature of the Commission's decisions made them unreviewable; the United States and the Interstate Commerce Commission, although defend-

ants, agreed with the appellants in their threshold contention that the court did have jurisdiction to review. Following a joint hearing, the district court on January 8, 1969, dismissed both suits, holding that decisions terminating investigations under Section 13a(1) are not "orders" within the meaning of 28 U.S.C. 1336(a), which provides for review of "any order" of the Commission (see A. 14, 16). Accordingly, the merits of the Commission's decisions were not considered in the district court and are not in issue here.

ARGUMENT

INTRODUCTION AND SUMMARY

Section 13a(1) of the Interstate Commerce Act, 49 U.S.C. 13a(1), provides that a railroad desiring to discontinue the operation of an interstate train may post and file a notice at least 30 days in advance of the proposed discontinuance. During the 30 day period the Interstate Commerce Commission may institute an investigation of the proposed discontinuance and may require the railroad to continue the operation of the train, "pending hearing and decision in such investigation," for not longer than four months after the proposed discontinuance would have become effective. "If, after hearing in such investigation * * * the Commission finds that the operation or service of such train * * * is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require [its] continuance * * *" (or restoration, if the four month period has expired) for not more than

one year from the date of its order. If the Commission does not require continuance, either with or without such an investigation, the train may be discontinued without regard to any state requirement.

Under 28 U.S.C. 1336(a) "any order" of the Interstate Commerce Commission is subject to judicial review. Since Section 13a(1) provides that the Commission may block a discontinuance "by order," it is clear that a railroad has the right to review if the outcome of the Commission's investigation is adverse to it. The question here is whether an order, issued with findings and conclusions of law terminating an investigation and thus in effect approving a discontinuance, is also an "order" reviewable under Section 1336(a), so that an interested party opposed to discontinuance has the same right to judicial review of decisions adverse to it. The district courts have disagreed on that question.[1] We believe that all determinations after investigation under § 13(a) are reviewable, whether the aggrieved party is a carrier or an opponent of discontinuance, and accordingly that the decision of the court below should be reversed.

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[1] In two cases, *State of Minnesota* v. *United States*, 238 F. Supp. 107 (D. Minn.), and *State of New Hampshire* v. *Boston and Maine Corporation*, 251 F. Supp. 421 (D.N.H.), the courts held—as did the court below—that Commission orders terminating Section 13a(1) investigations after hearing are not "orders" within the meaning of the judicial review statute. These decisions are directly contrary to subsequent decisions of three-judge district courts in *State of Vermont* v. *Boston and Maine Corporation*, 269 F. Supp. 80 (D. Vt.); *City of Williamsport* v. *United States*, 273 F. Supp. 899 (M.D. Pa.), 282 F. Supp. 46, affirmed *per curiam*, 392 U.S. 642; and *State of New York* v.

The presumption expressed in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, that administrative decisions are reviewable is not rebutted by any expression of congressional intent to forbid review of a Commission determination, after a full hearing, not to stop a proposed interstate train discontinuance. The opposite decision would be reviewable upon suit by the railroad, as would a Commission decision either way applying the identical substantive standard under the somewhat different procedure governing discontinuance of intrastate trains. See Section 13a(2), 49 U.S.C. 13a(2). There is no justification for an anomalous and inequitable denial of the right to judicial enforcement of the statutory standard to opponents of interstate discontinuances, alone. Equal weight should be given to both the needs of the railroads and the public interests asserted by such opponents in determining the question of reviewability, as it is in the substantive standards that the Commission must apply. Moreover, the conceptual

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United States, N.D.N.Y., No. 67-CV-207, appeal pending, No. 100, O.T., 1969. After the decisions in the instant cases were rendered by the court below, a different panel of three judges in the Northern District of Illinois (Swygert, C.J., Hoffman, and Marovitz, D.J.J.) denied a similar motion to dismiss a suit to review a Commission order of the same kind (*City of Chicago* v. *United States*, N.D. Ill., No. 68 C 2184, decided June 2, 1969).

It is well settled that a decision of the Commission not to enter into an investigation of a proposed discontinuance is not reviewable, since that decision is committed to the exclusive discretion of the Commission. *State of New Jersey* v. *United States*, 168 F. Supp. 324 (D.N.J.), affirmed *per curiam*, 359 U.S. 27; *Sludden* v. *United States*, 211 F. Supp. 150 (M.D. Pa.); *City of Williamsport* v. *United States*, *supra*, at 902, note 5.

arguments made against reviewability—that nothing more than agency "inaction" is involved since Section 13a(1) is "self-implementing" unless the proposed discontinuance is disapproved and, alternatively, that termination of an investigation is simply an extension of the Commission's unreviewable discretion not to investigate at all—do not withstand realistic analysis. When the Commission decides to investigate, it undertakes to decide whether the discontinuance is consistent with the statutory standard, and an affirmative answer to that question is just as much a decision on the merits as is a negative answer. The fact that an affirmative answer technically results in an order terminating the investigation rather than an order directing someone to do something or dismissing a complaint is, therefore, irrelevant to the question of reviewability.[2]

THERE IS NOTHING IN THE STATUTORY SCHEME ESTABLISHED BY SECTION 13a(1) OR IN ITS LEGISLATIVE HISTORY THAT NEGATES THE PRESUMPTIVE RIGHT TO JUDICIAL REVIEW OF INTERSTATE COMMERCE COMMISSION DECISIONS, AFTER HEARING, ALLOWING DISCONTINUANCES OF INTERSTATE TRAINS

A.

In these cases, the question for decision is, like that in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, whether

[2] While the Commission has recommended legislation removing any doubt as to the reviewability of orders entered after hearings refusing to continue train serivce, it has also advised Congress that it reads the existing statute as permitting judicial review of such orders on complaint of an aggrieved party. Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce on S. 1175, 90th Cong., 1st Sess. 11–12, 21–23.

Congress in enacting Section 13a(1) intended to forbid all review of a Commission decision after investigation allowing discontinuance of an interstate train. The appellants, which are chiefly governmental entities and which represented before the Commission the interests of those served by the discontinued trains, plainly have sufficient standing as aggrieved parties to invoke judicial review if it is available at all. Thus the only question presented is that of reviewability and, as the Court put it in *Abbott Laboratories,*

> The question [of reviewability] is phrased in terms of "prohibition" rather than "authorization" because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. * * * [T]he Administrative Procedure Act * * * embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a). * * * [O]nly upon a showing of "clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review. * * * [387 U.S. at 140–141.[3]]

[3] The Administrative Procedure Act was, of course, intended to apply to the Interstate Commerce Commission. *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472, 478 (D. Ore.), modified, 134 F. Supp. 210 (D. Ore.).

The railroad defendants in these cases argue that judicial review of favorable discontinuance decisions is inconsistent with the underlying congressional purpose to facilitate discontinuances in appropriate circumstances, and the court below accepted this argument. As we shall show, however, neither the legislative history nor the statutory scheme supports this proposition.

Section 13a(1), relating to discontinuance of interstate trains, and its companion Section 13a(2), relating to discontinuance of intrastate trains, originated as Section 5 of the Transportation Act of 1958, 72 Stat. 571. The purpose of the enactment was to establish a uniform federal scheme to supersede the confused, delayed and often inconsistent state procedures and results to which railroads were required to submit before discontinuing passenger trains.[4] In reporting upon the bill from which Section 5 of the Act was derived, a subcommittee of the Senate Committee on Interstate and Foreign Commerce observed (S. Rep. No. 1647, 85th Cong., 2d Sess. 22):

> Without reciting individual cases the subcommittee is satisfied that State regulatory bodies all too often have been excessively conservative and unduly repressive in requiring the maintenance of uneconomic and unnecessary services and facilities. Even when allowing the discon-

[4] It had been held that authorization of a train discontinuance was not within the Commission's power because it was not an abandonment of a line within Section 1(18) of the Act, 49 U.S.C. § 1(18). See *Board of Public Utility Commissioners of New Jersey* v. *United States*, 158 F. Supp. 98 (D.N.J.), vacated and remanded with instructions to dismiss for mootness, 359 U.S. 982.

> tinuance or change of a service or facility, these groups have frequently delayed decisions beyond a reasonable time limit. In many cases, State regulatory commissions have shown a definite lack of appreciation for the serious impact on a railroad's financial condition resulting from prolonged loss-producing operations.

The report concluded with a proposed remedy:

> To improve this situation, the subcommittee proposes to give the Interstate Commerce Commission jurisdiction in the field of discontinuance or change of rail services and facilities similar to the jurisdiction it now has over intrastate rates under section 13 of the Interstate Commerce Act so that when called upon to do so it may deal with such matters that impose an undue burden on interstate commerce. This, the subcommittee believes, would protect and further the broad public interest in a sound transportation system and would prevent undue importance being attached to matters of a local nature. [*Ibid.*]

Similar considerations were expressed in the House Report, H. Rep. No. 1922, 85th Cong. 2d Sess. 11–12. See also the remarks of Senator Smathers, 104 Cong. Rec. 10851–10852.

In order to achieve this legislative purpose, Congress established a single federal standard for permitting train discontinuances. This standard is "precisely the same" for both intrastate and interstate trains (despite some minor variations in language between Sections 13a(1) and 13a(2)), *Southern R. Co.* v. *North Carolina,* 376 U.S. 93, 103, and it requires "that the Commission balance the public need for the serv-

ice against the deficit resulting from it", *id.* at 102.[5] The bill as originally reported by the Senate Committee would have required the Commission to permit discontinuance of an operation upon a mere showing that the operation produced a deficit, regardless of the public need for the operation. An amendment requiring the Commission to balance the public need against the deficit was rejected in the Senate, but a similar amendment was adopted in the House and accepted by the Senate in conference. See *id.* at 101–102. Thus, Congress specifically focussed on the need to consider the public interest in both intrastate and interstate discontinuances, concluding that public concerns (such as those asserted by the appellants in these cases) should be given as much weight as the economic needs of the railroads.

Taking into account the differing governmental interests in interstate cases and those involving trains running wholly within the borders of a single state, Congress established somewhat different procedures to be followed by the Commission in each of the two situations. Section 13a(2) provides that a carrier may obtain federal authority to discontinue an intrastate train only after state relief has been denied or unduly delayed and the ICC has held a hearing on the carrier's petition; the result is ICC findings and an

[5] The *North Carolina* case dealt with the substantive standards to be applied by the Commission in an intrastate case. Substantive standards of review are, of course, not involved in the instant cases in their present posture and we are not to be understood to make any concessions in this brief with respect to the merits of the discontinuances to which the appellants object.

order specifically authorizing the discontinuance. With respect to interstate trains, on the other hand—as to which there is traditionally weaker state interest and stronger federal interest—Section 13a(1) makes discontinuance procedurally easier for the railroads. There is no requirement of resort to state authorities at all and the carrier need do no more than post and file with the ICC thirty days' advance notice of the proposed discontinuance; the discontinuance then takes effect automatically unless the Commission (1) determines in its discretion to institute an investigation (with or without a four-month stay of the discontinuance) and (2) concludes after hearing in the investigation that continuance of the train is required. As we have noted, the substantive standard to be applied by the Commission if it has a hearing upon investigation under Section 13a(1) has been held by this Court to be "precisely the same" as that to be applied in the hearing upon a petition filed by a carrier pursuant to Section 13a(2). And any investigation, once initiated, is governed by 49 U.S.C. 14(1), which provides in pertinent part:

> Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises * * *.

Thus, it is plain that once the Commission has taken the discretionary step of instituting an investigation under Section 13a(1), the proceeding that ensues before the Commission can differ little, if at

all, from the proceeding that would follow a petition under Section 13a(2). In each case the Commission is required to apply the same substantive standard, and in each case it is required to hold a hearing followed by an opinion stating its conclusions and decision.[6] The only difference if the railroad prevails before the Commission is that the 13a(2) proceeding results in an order authorizing discontinuance while the 13a(1) proceeding results in an order terminating the investigation and hearing initiated with a view to forbidding discontinuance; conversely, if the railroad loses, the 13a(2) result is a denial of the railroad's petition while the 13a(1) result is an order requiring continuance or restoration of service. We perceive no reason why any one of these four results should be any less subject to judicial review than the others; Congress was plainly equally concerned that all of these decisions should be in conformity with the common substantive standard. In three of these situations judicial review is undisputably available to the losing party—in both situations where the railroad loses and in the case of grant of a 13a(2) petition (assuming the protestant has the requisite

[6] There is also language in Section 13a(1) which suggests that Congress in that section intended the Commission to reach a "decision" one way or the other in the normal situation where it institutes an investigation. It is provided that the Commission may suspend a discontinuance "pending hearing and decision in such investigations." This is not to say that the Commission after ordering an investigation might not decide in an exceptional case that the investigation was improvidently ordered and thereupon terminate the investigation without making a decision on the merits. The Commission has not done so here.

standing), see *Southern R. Co.* v. *North Carolina, supra.* It is, therefore, both an anomaly and a departure from "elemental fairness" to say, as did the court below, that the defeated protestant to an interstate discontinuance alone shall have no opportunity to seek enforcement of the statutory standard in court. See *State of Vermont* v. *Boston and Maine Corporation, supra,* 269 F. Supp. at 84.

There is no legislative history suggesting that Congress intended the anomalous result reached below, and indeed there is legislative history to the contrary. Thus, in proposing the substantive standard that ultimately prevailed, Senator Javits assumed that parties opposed to discontinuance, as well as disappointed railroads, would have the right to judicial review. See 104 Cong. Rec. 10848–10849. Under these circumstances, there is nothing approaching the "clear and convincing evidence" of congressional intent required to rebut the presumption of reviewability.[7]

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[7] Compare *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, in which the Court found that the statutory scheme and legislative history plainly showed an intent that Mediation Board determinations in railroad labor representation cases be completely nonreviewable.

This case also differs substantially from *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.,* 383 U.S. 576, where this Court held that although a shipper could sue for direct review of a Commission order denying reparations, a carrier could not sue under Section 17(9) for review of an order awarding them. The Court held that review proceedings by carriers would deny shippers procedural and substantive benefits which Congress intended them to have, and that in any event the carrier could obtain review by defending

Although Congress intended to avoid undue delay in discontinuance proceedings, it does not follow, as the court below assumed (see A. 13), that Congress meant to deny judicial review of decisions allowing discontinuance. The policy of avoiding delay can be sufficiently implemented in the district courts by the expedition of review proceedings under Section 13a(1), particularly when a court has stayed a Commission order allowing discontinuance. Moreover, such stays are not automatic; they are subject to all of the considerations customarily applied to preliminary injunctions and the applicant for them bears a heavy burden. See, *e.g., Virginia Petroleum Jobbers* v. *Federal Power Commission,* 259 F. 2d 921 (C.A.D.C.); *Eastern Air Lines* v. *Civil Aeronautics Board,* 261 F. 2d 830 (C.A. 2); *Associated Securities Corp.* v. *Securities and Exchange Commission,* 283 F. 2d 773, 774–775 (C.A. 10). In short, the carriers' concern with undue delay goes to the procedures attending the review proceeding under Section 13a(1) rather than to the question whether adversely affected passengers and communities should have a right of review at all.[8]

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against the shipper's enforcement action or by filing a cross-action in the enforcement court. If the district court's decisions here were upheld, however, passengers and communities interested in preserving train service would be wholly without remedy.

[8] The same is true of the consideration, which also influenced the court below (A. 13, see also the *Minnesota* case, 238 F. Supp. at 113), that if there is judicial review of decisions allowing discontinuance, the Commission would be discouraged (presumably for fear of delay) from investigating doubtful cases.

B.

1. There is no inconsistency between the recognized principle that a decision by the Commission not to investigate a train discontinuance under Section 13a(1) is not reviewable (*State of New Jersey* v. *United States,* 168 F. Supp. 324 (D.N.J.), affirmed *per curiam,* 359 U.S. 27) and our position here that a decision allowing a discontinuance after a full proceeding on the merits is reviewable. A decision not to investigate is nothing more than a determination that the Commission will not initiate proceedings with respect to the railroad's announced intention to discontinue. That determination is expressly committed to the agency's discretion and, absent patent abuse, is therefore unreviewable. 5 U.S.C. (Supp. IV) 701(a)(2). When, however, the Commission determines to institute an investigation and sets the matter for hearing, in effect it is determining that a substantial question exists under the statutory standards for discontinuance and undertaking to decide that question pursuant to those standards. At this point (barring the exceptional situation where the Commission might determine subsequently that the investigation was improvidently begun) the Commission's unfettered discretionary control over the case ends; it is simply unreasonable to say that the Commission has "discretion" to decide the statutory issues that it has raised otherwise than in accordance with law.[9] Putting the matter in another way, the dis-

[9] In this connection, the court below mistakenly assumed that the reports and orders entered by the Commission upon termination of the investigations in these cases were merely

cretion argument amounts to the proposition that the Commission, while having no discretion to decide *against* the railroad, has a completely unreviewable discretion to decide *in favor of* the railroad. There is, however, no basis for saying that Congress intended the scope of the Commission's discretion in the investigation and hearing process to be determined by the result it plans to reach at the end of that process.

The distinction for purposes of review between an agency's discretionary decision not to undertake an investigation and its negative determination on the merits is well established. For example, a determination by the NLRB's General Counsel not to issue a complaint is ordinarily unreviewable,[10] yet a Board decision on the merits dismissing a complaint is reviewable on petition of the unsuccessful charging party. *Auto Workers* v. *Scofield*, 382 U.S. 205, 210, 219–220. The same considerations apply here.[11]

"gratuitous" acts (A. 12). The court overlooked the specific requirements of 49 U.S.C. 14(1) in this regard, pointed out at page 16, *supra*.

[10] See *e.g.*, *Mayer* v. *Ordman*, 391 F. 2d 889 (C.A. 6); *United Electrical Contractors Assn.* v. *Ordman*, 366 F. 2d 776 (C.A. 2), certiorari denied, 385 U.S. 1026; *Dunn* v. *Retail Clerks Int. Assn., AFL-CIO, Local 1529*, 307 F. 2d 285 (C.A. 6).

[11] Additionally, there is an analogy between Section 13a(1) and Section 15(7) of the Act (49 U.S.C. § 15(7)). Under Section 15(7) a Commission decision as to whether to suspend a new rate cannot be judicially reviewed, *Luckenbach Steamship Company* v. *United States*, 179 F. Supp. 605 (D. Del.), modified on other grounds, 364 U.S. 280, just as a decision not to investigate a proposed train discontinuance cannot be reviewed. On the other hand, it is well established that after consideration of the merits by the Commission, its final decision

2. The decision below and those of the other district courts that have taken the same view rest upon the conceptual premise that there is no decision to be reviewed when the Commission allows an interstate discontinuance after investigation and hearing because the statute is "self-implementing" in such a situation (A. 14; *New Hampshire, supra* note 1, 251 F. Supp. at 423–424; *Minnesota, supra* note 1, 238 F. Supp. at 111–112). The theory is that, while it takes a reviewable Commission order to stop a discontinuance, only Commission *inaction* is involved when the discontinuance is allowed to take effect. And inaction, in the nature of things, leaves nothing that can be reviewed.

Such conceptual reasoning ignores the realities of the situation as we have already described them. Once the Commission decides to rule upon the merits—as it did in these cases—the result obviously turns on which way the Commission resolves the merits, and the fact that the decision in form is one of whether or not to let the statute "implement itself" is immaterial. There is no reason to say that an affirmative answer to the statutory questions is "action" but a negative answer is "inaction." Either answer is a decision of the case that the Commission has undertaken to hear, a deci-

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not to set aside a new rate is reviewable. *E.g., Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671.

The court in *New Hampshire, supra* note 1, erroneously reasoned that Section 13a(1) requires only an "investigation" whereas Section 15(7) requires a "hearing" (251 F. Supp. at 424). However, Section 13a(1) expressly provides that the Commission may require continuance or restore service only "after hearing in such investigation," and thus the two statutory schemes are substantially the same.

sion with palpable practical impact, and both should be equally subject to judicial review. Indeed, there is no apparent reason why the Commission's orders in these cases, rather than terminating the investigations, could not in form have stated that the discontinuances were approved and the objections raised by the protestants at the hearings were overruled. Certainly the realities of the statutory scheme would have permitted the use of such terminology, which would make more explicit the nature of the action taken. In any event, it is the operational effect of the order and the nature of the proceeding leading up to it that should determine the reviewability of the order; its technical form is irrelevant.

Stating the matter in a somewhat different way, the initiation of a formal investigation puts in doubt the statutory right of the carrier to discontinue the train. This is shown by the Commission's power to require that the train be continued for a period of four months during the pendency of the proceedings and to direct that service be resumed if the suspension has expired but the public interest is utimately found to require continuance. The Commission must then hold a hearing looking toward a decision that will either confirm or eliminate the doubt created by the initiation of the investigation. If the Commission permits the discontinuance, it is in effect issuing a declaration of the carrier's statutory rights which removes the legal cloud upon that right raised by its determination to conduct the investigation. An administrative determination which thus removes an uncertainty, though negative in form, is a declaratory

order within the meaning of the Administrative Procedure Act (5 U.S.C. (Supp. IV) 551 (6); 5 U.S.C. (Supp. IV) 554 (e))[12] and is reviewable as such (5 U.S.C. (Supp. IV) 702). See *Frozen Food Express* v. *United States*, 351 U.S. 40.

The reasoning below—and in the other cases that have reached the same result—bears a remarkable resemblance to those early cases, since overruled, which held that courts could review only "affirmative" orders of an agency and could not review "negative" orders. See, *e.g.*, *Lehigh Valley Railroad Company* v. *United States*, 243 U.S. 412; *Procter & Gamble Company* v. *United States*, 225 U.S. 282. The negative order doctrine was firmly repudiated in *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125. In language that is equally applicable to the instant case, Mr. Justice Frankfurter stated for the Court (307 U.S. at 142–143):

> * * * An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action

[12] 5 U.S.C. (Supp. IV) 551(6) provides:

"(6) 'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.

5 U.S.C. (Supp. IV)554(e) provides:

"(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 384)."

and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. * * * We conclude, therefore, that any distinction, as such, between "negative" and "affirmative" orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding.[13]

CONCLUSION

For the foregoing reasons, the judgments of the court below should be reversed and each case remanded for determination on the merits.

Respectfully submitted.

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AUGUST 1969.

[13] The overruling of the negative order doctrine has been confirmed in the Administrative Procedure Act which expressly includes a "negative" order within the definition of an "order" subject to review. See 5 U.S.C. (Supp. IV) 551, 701(b)(2), 702.

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Nos. 101 and 102

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

CITY OF CHICAGO, et al., *Appellants*

v.

UNITED STATES OF AMERICA, et al., *Appellees*

On Appeals from the United States District Court for the Northern District of Illinois

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 101

CITY OF CHICAGO, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

No. 102

CITY OF CHICAGO, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeals from the United States District Court
for the Northern District of Illinois

BRIEF FOR APPELLANTS

Appellants in these consolidated appeals are 9 communities, 7 State regulatory commissions, 1 State, 3 labor organizations, and 1 railroad patron association.[1] They appeal

[1] Appellants in No. 101 are City of Chicago, The Metropolitan Government of Nashville and Davidson County, Tennessee, Village of Milford, City of Watseka, City of Hoopeston, City of Danville, City of Terre Haute, City of Vincennes, City of Henderson, Indiana Public Service Commission, Georgia Public Service Commission, Tennessee Public Service Commission, Alabama Public Service Commission

from the orders of the United States District Court for the Northern District of Illinois, entered January 8, 1969, dismissing their complaints seeking to set aside orders of the Interstate Commerce Commission relating to the discontinuance of a portion of the "Georgian" passenger train, and the complete discontinuance of the "Hummingbird" passenger train.

OPINIONS BELOW

The opinion of the court below in the "Georgian" case is reported at *City of Chicago v. United States*, 294 F. Supp. 1103. (A. 10-14) The opinion in the "Hummingbird" case is reported at *Tennessee Public Service Commission v. United States*, 294 F. Supp. 1106. (A. 15-16) Both opinions were rendered January 8, 1969, and the "Hummingbird" opinion incorporates by reference the opinion in the "Georgian" case.

The report of the Interstate Commerce Commission (Commission) in the "Georgian" case was entered January 25, 1968, and is reported at *Chicago & E.I. R. Co. Discontinuance—Chicago & Evansville*, 331 I.C.C. 447 (1968). (A. 19-41) The orders of the Commission upon reconsideration, original and corrected, entered May 8, and served May 15, 1968, are not reported. (A. 42-45).

The report of the Commission in the "Hummingbird" case was entered September 3, 1968, and is reported at *Louisville & N. R. Co. Discontinuance of Trains*, 333 I.C.C.

Mississippi Public Service Commission, Kentucky Railroad Commission, Maurice F. Radrizzi (United Transportation Union), and National Association of Railroad Passengers.

Appellants in No. 102 are City of Chicago, Tennessee Public Service Commission, Public Utilities Commission of Ohio, Alabama Public Service Commission, Mississippi Public Service Commission, Kentucky Railroad Commission, State of Louisiana, The Metropolitan Government of Nashville and Davidson County, Tennessee, Railway Labor Executives' Association and United Transport Service Employees (AFL-CIO).

720 (1968). (A. 48-67) The order of the Commission upon reconsideration, entered October 31, 1968, is not reported. (A. 68)

JURISDICTION

These proceedings were brought in a three-judge federal district court under 28 U.S.C. 1336(a), 2284, 2321-25, to set aside orders of the Interstate Commerce Commission. The orders of the district court dismissing the complaints were entered on January 8, 1969. Appellants filed their notices of appeals on March 6, 1969. This Court noted probable jurisdiction and consolidated the appeals on June 16, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2101(b).

STATUTES INVOLVED

The statutory provisions involved, set forth in the Appendix to this brief, are as follows:

Interstate Commerce Act, Sections 13a(1) and 17(9), 49 U.S.C. 13a(1) and 17(9);

Judicial Code, 28 U.S.C. 1336(a).

QUESTION PRESENTED

Do the United States District Courts possess jurisdiction to review decisions and orders of the Interstate Commerce Commission, entered under 49 U.S.C. 13a(1) after hearing and investigation, where the Commission has found that an interstate passenger train, or a part thereof, is not required by the public convenience and necessity and that continued operation thereof would unduly burden interstate or foreign commerce?

STATEMENT

These appeals will determine whether the public has the same right as a railroad to seek judicial review of final decisions of the Interstate Commerce Commission in passenger train discontinuance cases. This determination has been

made by the court below and by seven other three-judge district courts. Two early decisions ruled that States do not have the right to sue to set aside orders of the Commission, entered after hearing and investigation, where the Commission finds that a passenger train is not required by public convenience and necessity and that continued operation of a train will unduly burden interstate or foreign commerce. *State of Minnesota v. United States*, 238 F. Supp. 107 (D. Minn. 1965); *State of New Hampshire v. United States*, 251 F. Supp. 421 (D. N.H. 1965).

Subsequently, five district courts ruled to the contrary and held that the public does have the same right of judicial review as a railroad. *State of Vermont v. Boston & Maine Corp.*, 269 F. Supp. 80 (D. Vt. 1967); *City of Williamsport v. United States*, 273 F. Supp. 899 (M.D. Pa. 1967), 282 F. Supp. 46 (M.D. Pa. 1968), aff'd *per curiam* 392 U.S. 642 (1968); *State of New York v. United States* (No. 67-CV-207, N.D.N.Y. 1969);[2] *City of Chicago v. United States* (No. 68-C-2184, N.D. Ill. 1969); and *City of Sheridan v. United States* (No. 5316-Civil, D. Wyo.). Judicial review is pending, and trains are being operated pursuant to restraining orders, in *Penna. Pub. Util. Comm. v. United States* (No. 69-280, M.D. Pa.).

Another district court assumed jurisdiction without discussion. *People of State of California v. United States*, 258 F. Supp. 950 (N.D. Calif. 1966).[3] Mr. Justice Harlan, acting as a Circuit Justice, expressed an initial view that ultimate review does exist. *Public Service Board of State of Vermont v. United States*, 87 S. Ct. 3, 17 L.Ed.2d 42 (1966).[4]

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[2] Appeal pending, No. 100, O.T., 1969.

[3] Two unreported decisions have likewise assumed jurisdiction without discussion. See: 251 F. Supp. at 425.

PROCEEDINGS BELOW

The "Georgian" passenger train is operated jointly by Chicago & Eastern Illinois Railroad Company (C&EI) and Louisville & Nashville Railroad Company (L&N), between Chicago, Ill. and Atlanta, Ga., daily in each direction. The train is transported by C&EI for the 287 miles over its line between Chicago, Ill. and Evansville, Ind., where L&N engines and crews are substituted. L&N operates the "Georgian" for the remaining 444 miles to Atlanta, Ga., serving intermediate points such as Nashville and Chattanooga, Tenn.[4]

The "Hummingbird" train is operated by L&N between Cincinnati, Ohio and New Orleans, La., a distance of 927 miles entirely over L&N's line, serving intermediate points such as Louisville, Ky., Nashville, Tenn., Birmingham, Montgomery and Mobile, Ala., and Biloxi, Miss. The "Georgian" and "Hummingbird" trains interconnect at Nashville, Tenn. in the middle of the night, where certain coaches and sleeping cars are transferred between the two trains. Thus passengers may board the "Georgian" at Chicago in the early evening and arrive the following morning at Birmingham on the "Hummingbird" without having changed seat or berth.

On August 31, 1967, C&EI sought to discontinue all passenger service over its Chicago-Evansville line.[5] C&EI on

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[4]Both C&EI and L&N denominated their segments of the "Georgian" as No. 93 (southbound) and No. 54 (northbound). (A. 23)

[5]C&EI and L&N were at that time in the process of negotiating the sale of C&EI's Chicago-Evansville line. *Missouri Pac. R. Co.–Control–Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965), affirmed sub nom. *Illinois Central Railroad Company v. United States*, 263 F.Supp. 421 (N.D.Ill. 1966), aff'd *per curiam*, 385 U.S. 457 (1967). Such negotiations were to be completed within one year from February 7, 1967. The sale agreement was filed March 19, 1968 with the Commission, and subsequently approved. *Louisville & N.R. Co.–Pur.–Chicago & E.I.R. Co.*, 334 I.C.C. 273 (1968) and *Louisville & N.R. Co.–Trackage Rights*, 334 I.C.C. 412 (1969). The sale of the Chicago-Evansville line was consummated June 5, 1969. With respect to C&EI-L&N passenger train service, see 327 I.C.C. 279 at 298, 301, 332, 338, 361-62.

that day filed a discontinuance notice with the Commission pursuant to section 13a(1), mailed copies of the notice to the Governors of the States of Illinois and Indiana and posted the notice at all its stations in Illinois and Indiana, stating its intention to discontinue, effective October 1, 1967, its segment of the "Georgian" between Chicago, Ill. and Evansville, Ind. Simultaneously, C&EI also filed a petition pursuant to Section 13a(2) of the Interstate Commerce Act, 49 U.S.C. 13a(2), for authority to discontinue its daily intrastate train between Chicago and Danville, Ill. known as the "Danville Flyer".[6]

The Commission, in its Finance Docket No. 24725, on September 18, 1967, instituted an investigation into the proposed discontinuance of C&EI's segment of the "Georgian", and by the same order required continued operation of the trains for the maximum statutory period of four months pending hearing and decision in its investigation. (A. 17-18) The proceeding was heard on a consolidated basis with the "Danville Flyer" (Finance Docket No. 24726).[7] By report and order dated January 25 and served January 31, 1968, Division 3 of the Commission allowed discontinuance of C&EI's segment of the "Georgian" trains. 331 I.C.C. 477. (A. 19-41) The C&EI segment was discontinued February 1, 1968, so that the "Georgian" now operates only between Evansville, Ind. and Atlanta, Ga.[8]

[6]C&EI train No. 3 (southbound) and No. 4 (northbound).

[7]Sometimes referred to as the Companion case. Discontinuance of the "Danville Flyer" was denied August 14, 1968 in *Chicago & Eastern Illinois R. Co. Discontinuance*, 333 I.C.C. 626. C&EI on January 23, 1969 filed suit to set aside the Commission's decision. *Chicago & Eastern Illinois R. Co. v. United States* (No. 69 C 136, N.D. Ill.-E.D.). Hearing has been set for September 26, 1969 before Cummings, C.J., Austin and Marovitz, D.J.J.)

[8]L&N on July 9, 1969 filed notice that it proposed to discontinue the remaining Evansville, Ind.-Atlanta, Ga. segment of the "Georgian" effective August 13, 1969, now renumbered as No. 3 (southbound) and No. 4 (northbound). An investigation has been instituted, and

Certain protestants in the "Georgian" case petitioned the Commission for reconsideration alleging, among other things, that C&EI had not effectively invoked the provisions of Section 13a(1), and thus had not superseded the jurisdiction of the State regulatory commissions, because notice of the proposed discontinuance was not posted at stations south of Evansville, Ind., and that the notice, as posted, failed to describe the through-route nature of the train.[9] Division 3 of the Commission, acting as an Appellate Division, by order entered May 8 and served May 15, 1968 at 9:30 A.M., ruled in protestants' favor and dismissed the entire proceeding for failure of C&EI to invoke effectively the Commission's jurisdiction. (A. 42-43) However, some five and one-half hours later in that same day a so-called corrected order was issued holding the earlier order to be erroneous and denying protestants' petition in all respects. (A. 44-45) Appellants on May 27, 1968, instituted their action in the district court to review the Commission's decision. (A. 69-88).[10]

While the petition for reconsideration which resulted in the corrected order was pending before the Commission in the "Georgian" case, L&N, on April 3, 1968, posted and filed a section 13a(1) notice that it would discontinue, effective May 7, 1968, the connecting "Hummingbird" train over its entire run between Cincinnati, Ohio and New Orleans, La. The basic reason given by L&N for this action

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continued operation required pending hearing and decision in Finance Docket No. 25765, *Louisville and Nashville Railroad Company Discontinuance of Trains Nos. 3 and 4 Between Atlanta, Ga. and Evansville, Ind.; and Nos. 5 and 10 Between Evansville and St. Louis, Mo.* (July 30, 1969). A decision is expected about December 12, 1969.

[9]In essence the issue posited is the meaning of "train" as set forth in section 13a(1).

[10]The Commission on June 25, 1968 suggested a change in the notice provision of section 13a(1). *Study of Essential Railroad Passenger Service*, Hearings before subcommittee on Surface Transportation of the Senate Committee on Commerce, 90th Cong., 2d Sess., 143-47 (1968).

was that the discontinuance of C&EI's segment of the "Georgian" on February 1, 1968 had resulted in the immediate loss of the bulk of the passenger business handled on the "Hummingbird" between Cincinnati and New Orleans. The Commission on April 24, 1968 instituted an investigation into the proposed discontinuance of the "Hummingbird", and required continued operation for the maximum period of four months pending hearing and decision in its investigation. (A. 46-47)

Division 3 of the Commission, by report and order dated September 3 and served September 6, 1968, allowed the "Hummingbird" to be discontinued. 333 I.C.C. 720. (A. 48-67) In the report written by Commissioner Tuggle,[11] Division 3 took note of the pending court proceeding involving the "Georgian" train, but stated that the Commission could not "await (perhaps longer than a year) developments which, in the end, might or might not change the picture". 333 I.C.C. at 727-28. (A. 57-58) Upon service of the report and order, appellants that day instituted their action in the court below to review the "Hummingbird" decision. A temporary restraining order, barring L&N's discontinuance of the "Hummingbird", was entered September 6 (A. 112) and continued September 12, 1968. (A. 113)

The "Georgian" and "Hummingbird" cases were heard together by the same three-judge district court on November 4, 1968. Plaintiffs in the "Georgian" case had moved for summary judgment, largely based upon the jurisdictional grounds set forth in the Commission's first order served May 15, 1968. (A. 42-43) Defendants C&EI and L&N moved for dismissal of the complaints for lack of subject-matter jurisdiction in the court. (A. 89-94; 106)

The Opinions of January 8, 1969

The district court on January 8, 1969 granted the railroads' motions and dismissed both actions on jurisdictional

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[11] Commissioner Tuggle also was author of the "Georgian" report.

grounds, dissolving the temporary restraining order immediately. The "Hummingbird" opinion incorporated by reference the "Georgian" opinion. (A. 16) The court reasoned that where, as here, the Commission concluded after hearing and decision in its two investigations that continued operation of the trains is not warranted, the resultant order terminating each investigation is not a reviewable "order" within the meaning of the Judicial Code authorizing suits to set aside orders of the Interstate Commerce Commission. 28 U.S.C. 133(a). (App. 3) The district court acknowledged that the railroads have a right of review where they lose at the Commission, since an "order" requiring continued train operation would be involved. It also recognized that "there might be some unfairness here", but concluded "it is entirely within the spirit of the legislation to have given the railroads rapid relief without lengthy review (instituted by the public). The court noted that it was the delays by the State commissions that called forth the passage of section 13a(1), and held that Congress intended to deny judicial review in cases such as these. 294 F. Supp. at 1106-7. (A. 13-16) In view of its opinion on the jurisdictional issues, the court did not pass on the other questions presented. 294 F. Supp. at 1106. (A. 14)

Application for stay was denied January 9, 1969 by District Judge J. Sam Perry for want of jurisdiction of a single judge to stay the execution of a three-judge court order, noting the absence from the City of the other two participating judges. (A. 114) L&N that day immediately terminated the "Hummingbird" in mid-run at Birmingham, Ala., before an application for stay could be docketed with Mr. Justice Marshall that afternoon. The application was denied January 13, 1969.[12]

This Court on June 16, 1969 noted probable jurisdiction and consolidated the appeals. 89 S. Ct. 2103, 23 L. Ed. 2d 744.

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[12]The tumultuous events of January 9, 1969 are summarized in the weekly *Traffic World*, Vol. 137, No. 3, at p. 45 (Jan. 18, 1969).

SUMMARY OF ARGUMENT

These are the first appeals involving the interstate passenger train discontinuance provisions of Transporation Act of 1958 to be given plenary review by this Court. The sole issue presented concerns the right of judicial review where the Interstate Commerce Commission, after hearing and decision in its investigation, finds that a train is not required by public convenience and necessity and that continued operation will unduly burden interstate or foreign commerce. It is settled that in instances where the Commission does require continued operation, the railroad may seek judicial review under 28 U.S.C. 1336(a) because an "order" is entered requiring such operation. However, where the Commission finds that a train should be discontinued at the conclusion of its investigation, the order entered is one discontinuing the investigation. The court below held that such an order is not an "order" within the meaning of 28 U.S.C. 1336(a), so that States and the public do not have a right of judicial review when the agency's decision is adverse to them.

Contrary to the opinion below, the legislative history and statutory language support a right of judicial review where the Commission allows a train discontinuance after hearing and decision in its investigation. Commission orders which simply discontinue an investigation have been subject to judicial review since the "negative order" doctrine was overruled in 1939 and the Administrative Procedure Act was enacted in 1946. The contention that the Commission has unreviewable discretion whether to institute an investigation in the first place in no event renders the final agency decision immune from judicial review where the Commission has elected to conduct an investigation.

The statutory purpose of Section 13a(1) was to eliminate alleged delays by the State Commissions in the processing of train discontinuance applications. Congress was not concerned with "delays" attendant upon judicial review. To effectuate its goal Congress gave the Interstate Commerce

Commission a maximum period of four months within which to conduct its investigation. The concern of Congress with delays did not go beyond the agency level. Congress did not manifest any desire to curtail judicial review—and certainly did not indicate an intention to create the unfair and one-sided result of allowing judicial review to the railroads while denying a similar right to the public.

ARGUMENT

I. CONGRESS DID NOT INTEND THE UNFAIR RESULT OF DENYING JUDICIAL REVIEW TO THE PUBLIC WHILE GRANTING JUDICIAL REVIEW TO THE RAILROADS

The court below, in both opinions, inferred an intention of Congress to deny States and the public a right to seek judicial review of a passenger train discontinuance, while preserving such a right for the railroads when a train is ordered to be continued in operation by the Commission. The district court erred in assuming such a manifestly unfair and unjust intent by Congress to preclude judicial review for the public, but to grant a right of review to the railroads.

Section 13a of the Interstate Commerce Act was enacted as Section 5 of Transportation Act of 1958, 72 Stat. 571. It is composed of two paragraphs. Section 13a(1) governs the discontinuance or change of operation or service of a train operating in two or more States, whereas section 13a(2) applies when a train is operated wholly within a single State.

By enactment of section 13a(1), a railroad now has the option of having the Interstate Commerce Commission, rather than the State commissions, pass upon the discontinuance or change of service of an interstate passenger train. The only prerequisite to commencement of the procedure provided by section 13a(1) is that the contemplated discontinuance or change be subject to the jurisdiction of at least one of the States through which the train is oper-

ated. If this condition is satisfied, the carrier or carriers operating the train may invoke section 13a(1), and supersede State jurisdiction, by the filing, posting and mailing of notice at least 30 days in advance of any such proposed discontinuance or change. The Interstate Commerce Commission has authority within the 30 days notice period to enter upon an investigation of the proposed discontinuance or change, and may require continued operation for a maximum period of four months pending hearing and decision in the investigation. However, if the Commission determines not to enter into an investigation, or not to require continued operation pending hearing and decision, the carrier or carriers filing the notice may discontinue or change any such operation or service pursuant to the notice, irrespective of State laws.

If, after hearing in its investigation, the Commission finds that the trains are required by public convenience and necessity and that continued operation will not unduly burden interstate or foreign commerce, the Commission is empowered to require continued operation for a maximum period of one year from the date of said order. Upon the expiration of such an order after the investigation, jurisdiction reverts to the States, and the carrier or carriers are again free to exercise the option of invoking section 13a(1) by the filing, posting and mailing of new notices.

Where the Commission, after hearing and decision in its investigation, finds that the trains are not required by public convenience and necessity and that continued operation will unduly burden interstate or foreign commerce, an order is entered discontinuing the investigation, and the four-month continuance order is allowed to expire—any discontinuance of the trains thereafter being pursuant to the expiration of such order.

These appeals involve a train, and a portion of another train, which the Commission found, after hearing and decision in its investigations, were not required by public convenience and necessity and which would unduly burden

interstate and foreign commerce. The orders discontinuing the proceedings are clearly orders within the meaning of 28 U.S.C. 1336(a), and are subject to judicial review.

A. Legislative History. The district court seems to have recognized, as have other lower courts which have passed upon the question, that there is nothing specific in the legislative history of section 13a(1) to suggest that Congress intended to deny to the public the right to judicial review, while preserving that right to the railroads. The three-judge court for the District of Vermont stated, *State of Vermont v. Boston & Maine Corp.*, 269 F. Supp. 80, 84 (1967):

> " . . . we fail to find convincing evidence that the Congress intended the unusual and concededly unfair result of granting judicial review of the Commission's determination solely to the roads, and not to opposing parties.
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> " . . . If an order is wrongfully granted, the road can obtain review and reversal. If an order is wrongfully refused, ordinary principles of review of administrative determinations, as well as elemental fairness call for review at the instance of opposing parties. Congress having set standards for the Commission in the Act, its decision to refuse to order continuance as well as its decision to order it, should be reviewable."

The district court for the Middle District of Pennsylvania stated in *City of Williamsport v. United States*, 273 F.Supp. 899, 902 (1968):

> "A reading of the legislative history of the Transportation Act of 1958 indicates that Section 13a was designed to permit railroads, at their option, to have the Interstate Commerce Commission, rather than State Commissions, pass upon discontinuances or changes in the operation or service of trains. There is nothing to suggest that Congress intended to deny judicial review of passenger discontinuances."

There were no committee hearings held on the passenger train discontinuance provisions of S. 3778 and H.R. 12832 (85th Cong., 2d Sess.) which, as modified, became section 13a of the Interstate Commerce Act. The matter of judicial review was not raised in the floor debates. The committee and conference reports are silent.[13] This Court recently repeated its earlier ruling that Congress will not be presumed to cut-off judicial review unless there is strong reason to believe that such was the Congressional intent. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140 (1967):

> " . . . a survey of our cases shows that judicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."

There is recognized presumption in favor of judicial review of final action by an administrative agency. Jaffe, *Judicial Control of Administrative Action,* 336-53 (1965). Such a presumption prevails particularly where, as here, the general statutory framework and tradition provide that in the course of orderly procedure decisions of the Interstate Commerce Commission shall be subject to judicial review. *Florida East Coast Railway Company v. United States,* 228 F. Supp. 340, 343 (M.D. Fla. 1964); *United States v. ICC,* 337 U.S. 426, 433-34 (1949). The existence of a reviewing court's subject-matter jurisdiction should not be dependent upon whether it is the railroad or the public which prevailed at the agency level, absent an explicit Congressional intention to create such a disparity.[14] Recent hearings of the Surface Transportation Subcommittee of the U.S. Senate Committee on Commerce indicate that it is the general opinion of the members of the subcommit-

[13] S. Rep. No. 1647, H. Rep. No. 1922, and H. Rep. No. 2274, 85th Cong. 2d Sess. (1958).

[14] Cf. *Union Pacific R. Co. v. Price,* 360 U.S. 601, 615-16 (1959).

tee that section 13a(1) was not intended to prohibit court review.[15]

The case at bar bears a remarkable similarity to the former situation, since overruled, whereby a railroad could have complete judicial review of Commission orders granting reparations for unlawful rates, while the unsuccessful shipper was denied any judicial review at all. *United States v. ICC*, 337 U.S. 426 (1949).

B. Statutory Language. As with the legislative history, there is nothing in the statutory language which precludes judicial review where the Commission, after hearing and decision in its investigation, concludes that a passenger train need not be continued in operation. Nevertheless, the court below, relying principally upon *State of Minnesota v. United States*, 238 F. Supp. 107 (D. Minn. 1965), gave two basic reasons for holding that the language of the statute conveys an intention by Congress to preclude judicial review from the public, while preserving it solely for the railroads. These reasons are (1) the type of order entered by the Commission where the agency concludes that a train should be discontinued after the investigation, and (2) a comparison between the statutory language in section 13a(1) with that contained in section 13a(2), the latter governing intrastate train discontinuances. It is respectfully submitted that neither of these reasons is sufficient to support an inference that Congress intended to preclude judicial review from the public.

1. "Negative Order" doctrine. Where the Commission at the end of the four month period permitted it by Congress finds that the train is not required by public convenience and necessity and that continued operation will unduly burden interstate or foreign commerce, the agency, as it did here, allows its four month continuance order to expire,

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[15] *Passenger Train Discontinuances*, Hearings before subcommittee on Surface Transportation of Senate Committee on Commerce, 89th Cong., 2d Sess. (1966).

and enters an order discontinuing the investigation.[16] The court below held that an order discontinuing the investigation is not an "order" within the meaning of 28 U.S.C. 1336(a), so that judicial review is unavailable, as it constitutes agency "non-action". 294 F. Supp. at 1105-6. (A. 13-14)

In thus denying judicial review of an order terminating an investigation by the Interstate Commerce Commission, the court below has resurrected the "negative order" doctrine, long since discarded by this Court. *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 143 (1939):

> "We conclude, therefore, that any distinction, as such, between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding."

Indeed, the jurisdictional ruling made in *State of Minnesota v. United States*, 238 F. Supp. 107 at 112 (D. Minn. 1965), upon which the court below placed primary reliance, was in turn bottomed upon a case "effectively overruled"[17] by *Rochester Telephone Corp., supra. United States v. ICC*, 337 U.S. 426, 439-40, fn. 8 (1949).

Congress has specifically provided that orders of the Interstate Commerce Commission are subject to judicial review.[18] (App. 3) Moreover, the Administrative Procedure Act provides that judicial review of final agency action is available except to the extent that statutes preclude judicial review[19] or is committed to agency discretion by law.

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[16] The majority of the decisions rendered at the end of the four month period are made by Division 3 of the Commission, and thus are not administratively final, being subject to petitions for reconsideration. 49 CFR 1100.101(a)(2).

[17] *United States v. Los Angeles & S.L.R.R.*, 273 U.S. 299 (1927).

[18] 28 U.S.C. 1336(a).

[19] 5 U.S.C. 701(a)(1).

The same act defines an "order" as the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form.[20]

An order of the Commission which simply discontinues an investigation has for many years been considered an "order" within the meaning of 28 U.S.C. 1336(a). Orders discontinuing rate investigations are every day practice in the Commission's administration of section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), where the agency enters into an investigation of a new or changed freight rate, with or without suspension pending the conclusion of the investigation. If after investigation the Commission finds the new or changed rate to be just and reasonable, it simply enters an order discontinuing the investigation, without commanding the railroad to do anything. Recent examples of judicial review where the Commission simply enters an order discontinuing an investigation into proposed rate changes are: *Forwarder Volume Commodity Rates, Chicago and New York*, 308 I.C.C. 455 (1959) and 310 I.C.C. 199 (1960), sustained in *Eastern Express, Inc. v. United States*, 198 F. Supp. 256 (S.D. Ind. 1961), aff'd *per curiam* 369 U.S. 37 (1962). *Aggregate Rates on Wearing Apparel-Ry. Exp. Agency*, 318 I.C.C. 737 (1963) and 326 I.C.C. 92 (1965), sustained in *Central & Southern Motor Frgt. Tar. Ass'n. v. United States*, 273 F. Supp. 823 (D. Del. 1967); *Drugs and Related Articles, New Jersey to Chicago*, 322 I.C.C. 734 (1963) and 326 I.C.C. 6 (1965) reversed in *Eastern Central Motor Carriers Ass'n. v. United States*, 239 F. Supp. 591 (D.C. 1965), 251 F. Supp. 483 (D.C. 1966); and *Eastern Central Motor Carriers Assn. v. Baltimore & O. R. Co.*, 314 I.C.C. 5 (1961), sustained in *Cooper-Jarrett, Inc. v. United States*, 226 F. Supp. 318 (W.D. Mo. 1964) aff'd *per curiam* 379 U.S. 6 (1964).

Further, section 17(9) of the Interstate Commerce Act is applicable to judicial review of the "Georgian" and "Hum-

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[20] 5 U.S.C. 551(6).

mingbird" decisions of the Commission, since they were rendered by Division 3 of that agency, rather than by the full Commission. Section 1336(a) of Title 28 gives the district courts jurisdiction to review orders of the *Commission.* Section 17(9) of the Interstate Commerce Act provides that a suit to set aside a decision, order or requirement of a *division* of the Commission may be brought under the same provisions applicable in the case of suits to set aside orders of the Commission. (App. 2) Certainly the lengthy reports of Division 3 in these cases constitute "decisions" within the meaning of section 17(9).

2. Comparison with Section 13a(2). The court below states that non-reviewability for the public in section 13a (1) cases is supported by the language of section 13a(2), the latter paragraph requiring that Commission approval is expressly necessary for all intrastate train discontinuances. 294 F. Supp. at 1106. (A. 14) The district court erred in its conclusion based on this comparison. Simply because decisions of the Commission under section 13a(2) are made reviewable does not support a contention that Congress intended to *exclude* review of section 13a(1) decisions rendered after hearing. Indeed, it can be argued with equal force that Congress, having provided the public with the right of review under section 13a(2), also intended such right to exist under section 13a(1) absent an express declaration to the contrary. Recently this Court, in *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140 (1967), quoted with approval from Jaffe, *Judicial Control of Administrative Action*, 357 (1965):

> "The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right of review is too important to be excluded on such slender and indeterminate evidence of legislative intent."

As originally introduced in the Congress, S. 3778 and H.R. 12832, 85th Cong., 2d Sess. (1958), proposed a single section 13a to deal with all passenger trains—intrastate as

well as interstate. Section 13a ultimately became divided into a section 13a(1) and a section 13a(2). The legislative history of this devision shows that differences in language between the two paragraphs have absolutely nothing to do with judicial review. The same standards are to apply for both types of trains. The differences between section 13a(1) and 13a(2) relate to differences in procedures prerequisite to a hearing in the case of a wholly intrastate train, and the intent was to give the Commission jurisdiction after State authorities first had been afforded an opportunity to act or had failed or refused to authorize a train discontinuance. *Southern R. Co. v. North Carolina*, 376 U.S. 93, 103 and fn. 14 (1964). Concern for the initial jurisdiction of the States caused the differences in procedure between the two paragraphs. *New Jersey v. New York, S. & W. R. Co.*, 372 U.S. 1 (1963).

There is nothing to suggest that Congress desired to go beyond these procedural differences. At no point in the language of section 13a(2) does the word "order" appear. Section 13a(2) merely says that the Commission may "authorize" a train discontinuance.[21] Certainly this is no different from authorization of a train discontinuance under section 13a(1) by an order discontinuing the investigation, entered after an evidentiary hearing and accompanied by a report with detailed findings and conclusions.

C. **Agency Discretion To Institute an Investigation.** The district court stated an additional reason in support of its holding that agency action in a passenger train discontinuance case is not subject to judicial review, namely, the Commission has unreviewable discretion in determining whether to institute the investigation. The court cited as authority *State of New Jersey v. United States*, 168 F. Supp. 324 (D.N.J. 1958), aff'd *per curiam* 359 U.S. 27, *reh. den. sub nom. County of Berger v. United States*, 359 U.S. 950

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[21] The report of the Senate committee uses the word "authorize" without distinction as to intrastate or interstate trains. S. Rep. No. 1647, 85th Cong., 2d Sess., 14 (1958).

(1959),and *Sludden v. United States*, 211 F.Supp. 150 (M. D. Pa. 1962). However, those cases involved a ferry and a train discontinuance in which the Commission failed to institute an investigation within the 30 days' notice period. Consequently, the discontinuances became operative pursuant to the carriers notices. 294 F.Supp. at 1105. (A. 11-13) The appeals now before this Court involve an entirely different situation, because here the Commission *did* institute investigations, conducted extensive hearings, and issued comprehensive reports containing its findings and conclusions. But even if it ultimately should be held that a decision not to investigate a proposed discontinuance is non-reviewable, a question not presented by these appeals,[22] it nevertheless does not follow that a decision of the Commission rendered after hearing and investigation is likewise immune from judicial review. For example, the action of the National Labor Relations Board in not issuing a complaint is generally committed exclusively to that agency's discretion, yet if that agency does issue a formal complaint, its ultimate decision is subject to judicial review.[23]

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[22] Appellants do not concede, and contrary to the opinion of the court below (294 F. Supp. at 1105), did not concede there that there is no judicial review where the Commission decides not to enter into an investigation of a proposed train discontinuance. *State of New Jersey* held only that such a decision, consisting of a "notice", was not an "order" within the meaning of 28 U.S.C. 1336. 168 F. Supp. at 328-29. The district court in *State of New Jersey* did recognize and take jurisdiction under 28 U.S.C. 1331, 168 F. Supp. at 328, and considered whether the Commission's decision not to investigate was arbitrary or capricious. 168 F.Supp. at 335. Moreover, the author of that opinion subsequently recognized as reviewable an order denying reconsideration of a decision not to institute an investigation on jurisdictional grounds under 28 U.S.C. 1336 and 49 U.S.C. 17(9). *New York, Susquehanna & Western R. Co. v. United States*, 200 F. Supp. 860, 863 (D.N.J. 1961), rev. on other grounds sub nom. *New Jersey v. New York, S. & W. R. Co.*, 372 U.S. 1 (1963). It would seem incontestable, therefore, that there are limits to the Commission's discretion whether or not to hold an investigation.

[23] See *Jaffe, supra* at pp. 360-61 for a collection of cases on initial discretion in the labor field, but reviewable final action; Note, *Judicial Reviewability of NLRB Rulings*, 63 Nw. U.L. Rev. 106 (1968).

Another example is found in the action of the Interstate Commerce Commission in the exercise of its power to suspend new or changed freight rates, where the decision of the Commission is committed to its discretion. *Luckenbach Steamship Company v. United States*, 179 F. Supp. 605 (D. Del. 1959), dismissed as moot 364 U.S. 280 (1960); *Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658 (1963). Yet, the findings of the Commission in such cases made upon completion of the investigation are subject to judicial review. *Cincinnati, New Orleans & Texas Pac. Ry. Co. v. United States*, 229 F. Supp. 572 (S.D. Ohio 1964), mod. sub. nom. *Arrow Co. v. Cincinnati, N.O. & T.P.R.*, 379 U.S. 642 (1965).

Moreover, the court below incorrectly viewed train discontinuances which take place at the end of the four month investigation period as discontinuances which occur "automatically" in the same sense as a train discontinuance occurring "automatically" at the end of the 30 days' notice period. 294 F.Supp. at 1105. (A. 11-12) This is erroneous since a train discontinuance taking place pursuant to the carrier's notice at the end of the 30 days' notice period, in accordance with the second sentence of section 13a(1), differs from a train discontinuance taking place upon the expiration of the Commission's four month interim order.[24] A train discontinuance which becomes effective after hearing and decision in an investigation does not take place "automatically".[25] Such a train discontinuance after the four

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[24]Section 13a(1) technically does not provide for the "suspension" of a train discontinuance notice, as with the suspension of a changed freight rate pursuant to 49 U.S.C. 15(7), because the Commission issues an order affirmatively requiring continued train operation pending hearing and decision in its investigation. Nor do the Commission's rules provide for suspension supplements to the carrier's notice of proposed discontinuance. Cf. 49 CFR 1122 and 49 CFR 1300.8(k).

[25]The opinion below erroneously states that appellants concede that the source of the authority to discontinue after hearing in the

month period is as a result of a determination by the Commission not to renew its prior order, which it might have done for an additional period of up to one year. In such instances the Commission allows the initial order directing continued operation to expire, and discontinues the investigation accompanied by the statutory findings required by section 13a(1).

Once the Commission enters upon a formal investigation into a proposed train discontinuance, conducts hearings and compiles a record, it is not free to ignore the statutory standards prescribed by section 13a(1). The Commission does not have discretion to render erroneous decisions after such investigations, because its findings must in turn be supported by substantial evidence and otherwise in compliance with legal standards by which the correctness of agency action is traditionally measured. If it were otherwise, the hearings required to be held by the terms of section 13a(1) would be meaningless. Judicial review is the technique by which Congress insures that its standards will be carried out by the administrative agency.

The possibility that the Commission ultimately may be held to possess certain discretion in deciding whether to institute an investigation[26] does not justify making the far-reaching conclusion that the Commission is relieved of all responsibility for having its reports comply with the standards set by Congress in section 13a(1).

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investigation stems from the statute rather than from any action of the Commission. 294 F. Supp. 1105. No such concession was made.

[26] The authority for the proposition that the Commission has unreviewable discretion whether to institute a train-off investigation rests upon *State of New Jersey v. United States*, 168 F. Supp. 324 (D. N.J. 1958), aff'd *per curiam* 359 U.S. 27 (1959). By the same token the judgments below might have been summarily reversed upon the authority of *City of Williamsport v. United States*, 273 F. Supp. 899, 282 F. Supp. 46 (M.D. Pa. 1968), aff'd *per curiam* 392 U.S. 642 (1968).

II. THE STATUTORY PURPOSE OF SECTION 13a(1) IS DIRECTED AGAINST DELAYS BY STATE COMMISSIONS AND NOT AGAINST ORDERLY JUDICIAL REVIEW.

An important concern of the court below would appear to be its belief that Congress intended no judicial review because that might create "delays" in finally determining whether a train discontinuance is warranted. The court referred to the "crisis" facing the railroads in 1958, implying that the "spirit" of the legislation "was to give the railroads rapid relief without lengthy judicial review". 294 F. Supp. at 1106. (A. 13)

Transportation Act of 1958 was motivated by the financial condition of the railroads. The legislation was the outgrowth of hearings held in early 1958 by the Subcommittee on Surface Transportation of the U.S. Senate Committee on Interstate and Foreign Commerce. The Subcommittee recommended eight amendments to the Interstate Commerce Act, but only one of these—and the least discussed—was concerned with passenger train service, and then only as part of unprofitable services generally:

> "(5) To vest the Interstate Commerce Commission with authority to authorize, in proper cases, the discontinuance, curtailment or consolidation of unprofitable railroad services and facilities burdening interstate commerce."[27]

Other proposed amendments included loan guarantees, construction reserve funds, competitive ratemaking, State rate discriminations, motor carrier agricultural exemptions, private motor transportation, and provisions for transportation policy studies. In short, passenger service was but one of many recommendations. The legislation, as enacted, embraced all of these recommendations with the exception of construction reserve funds and transportation policy studies. There is nothing to suggest that only the passenger train

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[27]S. Rep. No. 1647, 85th Cong. 2d Sess., 14 (1958).

amendment to the Interstate Commerce Act—and then only the so-called "negative" orders under section 13a(1)—were to be exempted from judicial review. In marked contrast are the other amendments to the Interstate Commerce Act made by Transportation Act of 1958. Action taken under the new or revised sections 1(2)(a), 1(17)(a), 13(4),[28] 15a,[29] 203(b),[30] 203(c),[31] and section 13a(2)[32] are subject to review in the courts.

Congress was concerned with alleged delays by State regulatory authorities in authorizing, or absolutely refusing to authorize, discontinuance of little-used services.

The House Committee report stated.[33]

> "Under the act, the Interstate Commerce Commission has jurisdiction over the complete abandonment of a line of track. The discontinuance or change of schedules of trains (without complete abandoning of the line of track over which they operate) however, is subject to the jurisdiction of the interested States. Such local regulation of what has come to be a national problem has hampered the railroads from making some changes in their passenger train operations in line with changes in patronage, and has contributed greatly to the passenger deficit. Witnesses have not suggested that all State commissions have taken obstructive atti-

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[28] *Utah Citizens Rate Association v. United States*, 192 F. Supp. 12 (D. Utah 1961), aff'd *per curiam* 365 U.S. 649 (1961).

[29] *ICC v. New York, N.H. & H. R. Co.*, 372 U.S. 744 (1963); *American Lines v. L. & N. R. Co.*, 392 U.S. 57 (1968).

[30] *Willis Shaw Exp. v. United States*, 377 U.S. 159 (1964).

[31] *Red Ball Motor Freight v. Shannon*, 377 U.S. 311 (1964).

[32] *State of Montana v. United States*, 202 F. Supp. 660 (D. Mont. 1962); *City of Philadelphia v. United States*, 197 F. Supp. 832 (E.D. Pa. 1961); *People of State of California v. United States*, 207 F. Supp. 635 (N.D. Calif. 1962).

[33] H. Rep. No. 1922, 85th Cong. 2d Sess., 12 (1958).

tudes, but only that it has proved impossible to secure necessary relief in some States. The National Association of Railroad and Public Utilities Commissioners has been active in recommending a more helpful attitude on the part of its members, but the recommendations appear not to have been adopted by some of them.

"Because of this delay in authorizing, or absolute refusal to authorize, discontinuance of little-used services, it is proposed to add a new section 13a to the act, whereby the railroads, at their option, may have the Interstate Commerce Commission, rather than State commissions, pass upon the discontinuance or change in the operation or service of any train or ferry."

The Senate report also took aim at the State agencies:[34]

"Railroad management, it must be understood, is not always free without authorization to discontinue, curtail, consolidate or otherwise change services or facilities in an effort to deal realistically with unprofitable, deficit-producing operations. Generally speaking, such matters fall within the scope of State law; and in a great many instances a railroad may not discontinue or change the operation of a train or other service or facility without first obtaining permission to do so from the regulatory authority of the State in which the operation is conducted.

"Without reciting individual cases the subcommittee is satisfied that State regulatory bodies all too often have been excessively conservative and unduly repressive requiring the maintenance of uneconomic and unnecessary services and facilities. Even when allowing the discontinuance or change of a service or facility, these groups have frequently delayed decisions beyond a reasonable time limit."

As a result of alleged delays by State commissions, the Interstate Commerce Commission was given a maximum

[34]S. Rep. No. 1647, 85th Cong., 2d Sess., 21-22 (1958).

period of four months, beyond the notice period, within which it could require continued operation of a train pending hearing and decision in its investigation. This literally compels a decision within the five-month period if the Commission is to keep the train in operation.

The charges of delay by the State commissions did not extend to the State judiciary. There was no claim by the Congress that the State courts were tardy in their judicial review of State regulatory commission decisions. Thus there is no basis whatsoever for assuming that Congress, in providing an optional forum for the railroads, desired to curtail court review of decisions authorizing train discontinuances.[35] Section 13a(1) was directed specifically against the State regulatory agencies—the statute is cast in terms of "superseding" State law. Contrary to the opinion of the court below, Congressional concern with delays by the State commissions cannot be extended so as to infer a concern by Congress with the time consumed in orderly judicial review of agency action.

As of December 31, 1968 the Commission had instituted a total of 232 investigations since enactment of section 13a(1) in 1958.[36] Of these 232 investigations, judicial review has been sought in only 13 known instances, 2 of which are now before this Court in these consolidated appeals; and of the 13 court cases, injunctive relief was applied for in only 6 situations. Hence it is sheer fantasy to assert that the right of judicial review creates any "delay" crisis for the railroad industry.

The importance of judicial review cannot be overstated. The issues still unresolved below—principally represented by the two conflicting orders entered by the Commission in the "Georgian" case—are of fundamental importance to the administration of section 13a(1) by the Commission

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[35] Cf. *A.F. of L. v. Labor Board*, 308 U.S. 401, 409-10 (1940).

[36] Interstate Commerce Commission, *Proceedings Under Section 13a of the Interstate Commerce Act as of December 31, 1968* (1969).

and will affect a great number of other proceedings. (A. 42-45) Congress is well aware that the small percentage of cases which are reviewed in court nevertheless have a salutory effect upon the administrative process. Any "delay" in the final resolution of a few cases is more than offset by the watchdog role of the courts in policing the statutory standards set by Congress.

CONCLUSION

For the foregoing reasons, the decisions of the district court in these cases are in error in holding Congress deprived the public of a right to judicial review and should be reversed.

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APPENDIX

Interstate Commerce Act. Title 49, United States Code:

Section 13a(1).

A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four

months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

Section 17(9).

When an application for rehearing, reargument or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Judicial Code, Title 28, United States Code:

Section 1336(a).

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

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JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1969

No. 101

CITY OF CHICAGO, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

No. 102

CITY OF CHICAGO, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

On Appeal From the United States District Court for the Northern District of Illinois

BRIEF FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE

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v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

On Appeal From the United States District Court for the Northern District of Illinois

---

BRIEF FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE

THE INTEREST OF THE NARUC AS AMICUS CURIAE

The National Association of Regulatory Utility Commissioners, herein referred to as the "NARUC", is a quasi-governmental nonprofit organization founded in

1889. Within its membership are the governmental bodies of the fifty States engaged in the regulation of carriers and public utilities. The chief objective of the NARUC is to serve the public interest through improving the quality of government regulation.

More specifically, the NARUC contains the State officials charged with the duty of regulating railroad operations within their respective States and as such they are experienced in the interrelations of Federal and State railroad regulation, and with the many ramifications applicable to the overall regulation of the railroad industry. They have the obligation to assure, within their respective States, the establishment and maintenance of such railroad service and facilities as may be required by the public convenience and necessity, and to see that the same are provided at rates and charges that are just and reasonable.

In instances, such as reflected by this litigation, where State jurisdiction is preempted under Section 13a of the Interstate Commerce Act (49 U.S.C., Sec. 13a), involving the proposed discontinuance of interstate passenger train service, the member agencies of the NARUC have the duty of advocating the public interest of their respective States before the Interstate Commerce Commission when necessary to preserve vital service. And in instances where the Commission decides to allow the discontinuance of such service, the member agencies of the NARUC, as the tribunes of the public of their respective States, have the ancillary duty to appear before the Federal courts to test the compatibility of such Commission decisions with the requirements of Section 13a and other applicable provisions of Federal law.

Since these appeals present the issue of whether the NARUC member agencies and other public representatives have the same right as a railroad to seek judicial

review of final decisions of the Commission in passenger train discontinuance cases, the disposition of these appeals by the Court will be of paramount regulatory importance and will have a direct affect on the future vitality of State agencies in advocating the public interest in the field of railroad service. Therefore, the members of the NARUC, as government regulators, have a vital and direct interest in these appeals.

STATUTES INVOLVED

Section 13a of the Interstate Commerce Act, 49 U.S.C. § 13a, 72 Stat. 571, provides:

> (1) A carrier or carriers subject to this chapter, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one state to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by

the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by orders served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change

unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

(2) Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this chapter, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisidction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of

> such carrier or carriers or upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph.

28 U.S.C. 1336(a) provides:

> Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annual or suspend, in whole or in part, any order of the Interstate Commerce Commission.

The introductory clause of the Administrative Procedure Act, as revised, 5 U.S.C. (Supp. IV) 701(a), provides:

> (a) This chapter applies, according to the provisions thereof, except to the extent that–
>
> (1) statutes preclude judicial review; or
> (2) agency action is committed to agency discretion by law.

Section 10(a) of the Administrative Procedure Act, as revised, 5 U.S.C. (Supp. IV) 702, provides:

> A person suffering legal wrong because of agency action, or adversely affected or

aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

QUESTION PRESENTED

Whether the findings and decision of the Interstate Commerce Commission, issued after hearing and investigation, allowing the discontinuance of operation of railroad train service, purportedly pursuant to Section 13a(1) of the Interstate Commerce Act, as amended (49 U.S.C., Sec. 13a(1)), are subject to review by a United States District Court upon the complaint of an interested party adversely affected or aggrieved by such findings and decision.

STATEMENT

These cases concern direct appeals from two final orders of a three-judge United States District Court for the Northern District of Illinois which dismissed for lack of jurisdiction actions brought by the appellants to review the lawfulness of decisions of the Interstate Commerce Commission allowing the appellees to discontinue the operation of certain passenger train service known as the "Georgian" and "Hummingbird."

The Georgian passenger train is operated jointly by the Chicago & Eastern Illinois Railroad Company (C&EI) and the Louisville & Nashville Railroad Company (L&N) between Chicago, Illinois, and Atlanta, Georgia. C&EI operates the train between Chicago and Evansville, Indiana, a distance of 287 miles; and the L&N operates the train the remaining 444 miles to Atlanta. This Chicago-Atlanta service was provided daily in each direction.

The Hummingbird passenger train is operated by the L&N between Cincinnati, Ohio, and New Orleans, Louisiana, a distance of 927 miles. The Georgian and Hummingbird interconnect in Nashville, Tennessee, where certain cars are interchanged between the trains.

The C&EI on August 31, 1967, gave notice to the Commission, the Governors of Illinois and Indiana, and others, purportedly pursuant to Section 13a(1), of its intention to discontinue operation of its segment of the Georgian between Chicago and Evansville effective October 1, 1967. The Commission on September 18, 1967, instituted an investigation into the proposed discontinuance of C&EI's segment of the Georgian (Finance Docket No. 24725), and by the same order required continued operation for the maximum statutory period of four months pending hearing and decision in its investigation. A. 17-18. Division 3 of the Commission, by report and order served on January 31, 1968, allowed discontinuance of C&EI's segment of the Georgian. *Chicago & Eastern Illinois Railroad Co. – Discontinuance of Trains, etc.*, 331 I.C.C. 447 (No. 101, A. 19-40). C&EI discontinued this segment on February 1, 1968, so that the Georgian now only operates between Evansville and Atlanta.[1]

Certain protestants petitioned the Commission for reconsideration of its decision in the Georgian case on the ground, *inter alia*, that C&EI did not effectively invoke the Section 13a(1) remedy, and hence did not supersede contrary State requirements, because notice of the proposed discontinuance was not posted at stations

[1] L&N on July 9, 1969, filed a Section 13a(1) notice of its intention to discontinue the remaining Evansville-Atlanta segment of the Georgian effective August 13, 1969. The Commission instituted an investigation on July 30, 1969, and ordered continued operation pending hearing and decision. *Louisville and Nashville Railroad Company – Discontinuance of Trains, etc.*, Finance Docket No. 25765.

south of Evansville, and that notice, as posted on the Chicago-Evansville segment, failed to describe the through-route nature of the train.[2] However, Division 3 of the Commission, acting as an Appellate Division, denied reconsideration by an order served on May 15, 1968. A. 44-45. The protestants (appellants in No. 101) on May 27, 1968, instituted an action in the United States District Court for the Northern District of Illinois seeking review of the Commission's decision with respect to the C&EI segment of the Georgian.[3] A. 69-88.

The L&N on April 3, 1968, gave notice under Section 13a(1) of its intention to discontinue the Hummingbird passenger service between Cincinnati and New Orleans effective May 7, 1968. The L&N contended that the discontinuance of C&EI's segment of the Georgian on February 1, 1968, resulted in the loss of the bulk of the passenger business of the Hummingbird. The Commission on April 24, 1968, instituted an investigation into the proposed discontinuance of the Hummingbird, and required its continued operation for the maximum statutory period of four months pending hearing and decision in the investigation. A. 46-47. Division 3 of the Commission, by report and order served on September 6, 1968, allowed discontinuance of the Hummingbird. 333 I.C.C. 720; A. 48-67.

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[2] This contention requires a judicial interpretation of the word "train" as used in Section 13a(1).

[3] The original plaintiffs were City of Chicago, Metropolitan Government of Nashville and Davidson County, Tennessee, Village of Milford, City of Watseka, City of Hoopeston, City of Danville, City of Terre Haute, City of Vincennes and Maurice F. Radrizzi (United Transportation Union). Intervening plaintiffs were Alabama Public Service Commission, Georgia Public Service Commission, Indiana Public Service Commission, Kentucky Railroad Commission, Mississippi Public Service Commission, Tennessee Public Service Commission, City of Evansville, City of Henderson, and National Association of Railroad Passengers.

Parties aggrieved by the allowance of discontinuance (the appellants in No. 102)[4] immediately instituted an action in the United States District Court for the Northern District of Illinois seeking review of the Commission's decision. The District Court issued a temporary restraining order on September 6, 1968, to prevent the discontinuance of the Hummingbird (A. 112), and the order was continued on September 12th (A. 113).

The Georgian and Hummingbird cases were heard together by the same three-judge panel of the District Court on November 4, 1968. The defendant railroads contended that the nature of the Commission's decisions made them unreviewable. The United States and the Commission, although defendants, agreed with the plaintiffs in their threshold contention that the District Court did have jurisdiction to review. Nevertheless, the District Court on January 8, 1969, granted the motions of the C&EI and the L&N to dismiss the complaints for lack of jurisdiction over the subject matter, and dissolved the temporary restraining order. The Court held that a Commission decision allowing discontinuance of train service under Section 13a(1) was not a reviewable "order" within the meaning of the provision of the Judicial Code which confers jurisdiction on the district courts to review Commission orders. 28 U.S.C., Sec. 1336(a).

The District Court acknowledged that railroads have a right to seek review under the Judicial Code in cases

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[4] The original plaintiffs were the Alabama Public Service Commission, State of Louisiana, Ohio Public Utilities Commission, Tennessee Public Service Commission, City of Chicago, The Metropolitan Government of Nashville and Davidson County, Tennessee, Railway Labor Executives' Association and United Transport Service Employees (AFL–CIO). The Kentucky Railroad Commission and the Mississippi Public Service Commission later intervened.

where the Commission by "order" requires continuation of train service, and that "there might be some unfairness here". However, the District Court observed that "it is entirely within the spirit of the legislation to have given the railroads rapid relief without lengthy review (by the public)". Accordingly, the District Court held that Congress intended to deny judicial review in cases where the Commission allowed discontinuance of train service. 294 F. Supp. 1106-7; A. 13-16.

Following the District Court's denial of an application for stay, the L&N on January 9, 1969, discontinued the Hummingbird in mid-run at Birmingham, Alabama.

This Court on June 16, 1969, noted probable jurisdiction and consolidated the appeals. __ U.S. ___, 23 L.Ed. 2d 744, 89 S.Ct. 2103.

ARGUMENT

I.

THE RIGHT OF JUDICIAL REVIEW IS ONE OF THE BASIC TENETS OF OUR JURISPRUDENCE AND SHOULD BE LIBERALLY CONSTRUED.

The principle of judicial review evolved as a part of the common law on a case-by-case basis. Under our system of government, the Federal judiciary is the ultimate arbiter of issues regarding the lawfulness of the actions of Federal officers and agencies. As it was stated in the Final Report of the Attorney General's Committee on Administrative Procedure (1941) at p. 75:

> [T]o a very considerable degree, judicial review of administrative action is molded by the courts. Theirs is the power of final interpretation of the statutory guides, and theirs is

> the power to provide judge-made remedies when statutes are silent.

In contrast to the English system, where the Crown historically constituted the source of power and accordingly commissioned judges to review administrative action, it is theoretically more difficult for the American judiciary to assert jurisdiction to review administrative action under the constitutional doctrine of separation of powers.[5] However, notwithstanding the separation of powers, this Court has construed its own charter as stated in Article III, Section 2, of the Constitution as paramount.[6]

The specific origins of jurisdiction to review administrative decisions can be traced to an assumption made by the early state courts which were often direct descendants of colonial courts chartered by the King of England. These courts assumed they had inherited the powers of the English courts and they, therefore, claimed the prerogative writ jurisdiction of the King's Bench.[7]

As was stated in the dissent in *Kendall v. United States ex rel Stokes*, 12 Pet. 524, 630, 9 L.Ed. 1181, 1223 (1838):

> [The power to issue prerogative writs was] possessed by the court of kings bench; because the king originally sat there in person and aided the administration of justice. . . . [T]his power would not be incident to any court

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[5] Jaffe, Judicial Review of Administrative Action, p. 154 (3rd ed. 1965).

[6] Stark v. Wickard, 321 U.S. 288, 310, 88 L.Ed. 733, 748 (1944).

[7] *E.g.* Howard v. Gage, 6 Mass. 462, 463-64 (1810); Runnel v. Winemiller, 4 Harr. & McH. 429 (Md. 1799); State v. Justices, 1 Coxe 244 (N.J. 1794).

> which did not possess the general superintending power of the court of kings bench, in which sovereignty might by construction of law be supposed to sit and to exert there its prerogative powers . . . in order that a right might not be without a remedy.

The railroad regulatory agencies had their beginnings in the States *circa* 1870. Their development was a response to the de-emphasis of agrarianism and to the initial growth of our urban, industrial society.[8] But then as the legislatures directed their attention to the burgeoning need for utility regulation in the last decade of the Nineteenth Century and the first decade of this Century, they attempted to relieve regulatory agencies of the "burden" of judicial review so far as possible.[9]

However, the lack of wisdom in such attempts became evident in our "rights" oriented society because as Pound stated:

> In a constitutional legal polity all exercise of the power of politically organized society calls for checks. That checks are peculiarly needed with respect to administrative adjudication is made clear by consideration of certain tendencies which may be seen in administrative action not merely in American administrative agencies, federal and state, but in like agencies in England and in the British dominions. *Id.*, at 438.

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[8] II Pound, Jurisprudence, p. 410 (1950).

[9] *Id.*, at 413. Pound refers to an amendment to the California Constitution adopted in 1911 providing that decisions of the railroad commission shall not be subject to review by any court except where such decision will result in confiscation of property. Const. Cal. art. § 20.

In accord with this concept favoring judicial "checks", this Court in recent times greatly expanded the scope of judicial review in a series of cases. For example, in *Powell v. McCormack*, ___ U.S. ___, 23 L.Ed2d 491 (1969), the Court reviewed the validity of a members' exclusion from the House of Representatives. And in *Wesberry v. Sanders*, 376 U.S. 1, 11 L.Ed.2d 481 (1964), *Baker v. Carr*, 369 U.S. 186, 7 L.Ed.2d 663 (1962), and similar cases, judicial remedies were applied in cases contesting the validity of Federal and State legislative apportionments.

In the light of this evolution, two writers in the field of administrative law have asserted that there is a presumption of judicial review. Professor Jaffe, in his work quoted by this Court in *Abbott Laboratories v. Gardner*,[10] states that:

> I start with a rash, and some will say a meaningless, proposition. It is this: in our system of remedies, the individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity. This is to me the teaching of our history and tradition. It is our common law, and in a lesser measure a corollary of our constitutions. I am well aware that this assertion can be criticized as a futile, an empty, a useless generality. I think on the contrary that it is an important proposition, and if it is entertained by a court it may become a crucial factor in the decision to review. . . . [I]n cases of statutory ambiguity or silence, and in new situations in which there

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[10] 387 U.S. 136, 18 L.Ed. 2d, 681 (1967).

> are factors pro and con, the issue of reviewability may become acute. In such situations the presumption of reviewability plays a decisive role. Jaffe, *Judicial Control of Administrative Action*, p.336 (3rd ed. 1965).

To the same effect, Kenneth Culp Davis in his article entitled *Unreviewable Administrative Action*, 15 F.R.D. 411, 426 (1954) states: "The decisions . . . fit reasonably well the idea of a presumption of reviewability that may be rebutted by *affirmative* indication of legislative intent in favor of unreviewability.[11] (Emphasis supplied.)

II.

THE PROVISIONS OF SECTION 13a(1) DO NOT DENY THE PRESUMPTIVE RIGHT TO JUDICIAL REVIEW OF DECISIONS OF THE INTERSTATE COMMERCE COMMISSION ALLOWING THE DISCONTINUANCES OF TRAINS.

These appeals present the issue of whether the public has the same right as a railroad to seek judicial review of final decisions of the Interstate Commerce Commission

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[11] Davis states elsewhere: "[A] good deal of administrative action that is now unreviewable should be reviewable. . . . [T]he presumption of reviewability might well be strengthened, so that a goodly portion of the borderline cases that are now unreviewable will be subjected to judicial check. I think that: (1) availability of judicial check does not weaken administrative power but strengthens it; (2) cutting off the courts sometimes violates the cardinal principle that functions should be allocated between courts and agencies on the basis of comparative qualifications; and (3) the principle of check is useful except for subject matter that is intrinsically unsuitable for review." Davis, *Judicial Control of Administrative Action: A Review*, 66 Colum. L. Rev. 635, 650-51 (1966).

in passenger train discontinuance cases under Section 13a(1) of the Interstate Commerce Act. This issue has been considered by the district court below and by six other three-judge district courts. Two early decisions ruled that States do not have the right to sue to set aside decisions of the Commission, entered after hearing and investigation, where the Commission finds that a passenger train is not required by public convenience and necessity and that continued operation of the train would unduly burden interstate or foreign commerce. *State of Minnesota v. United States,* 238 F. Supp. 107 (D. Minn. 1965); *State of New Hampshire v. United States,* 251 F. Supp. 421 (D.N.H. 1965).

Subsequently, four district courts ruled to the contrary and held that the public does have the same right of judicial review as a railroad. *State of Vermont v. Boston & Maine Corp.,* 269 F. Supp. 80 (D. Vt. 1967); *City of Williamsport v. United States,* 273 F. Supp. 899 (M.D. Pa. 1967), 282 F. Supp. 46 (M.D. Pa. 1968), aff'd *per curiam* 392 U.S. 642 (1968); *State of New York v. United States* (No. 67-CV-207, N.D.N.Y. 1969);[12] *City of Chicago v. United States,* (No. 68-C-2184, N.D. Ill. 1969). Judicial review is pending, and trains are being operated pursuant to restraining orders, in two cases: *City of Sheridan v. United States* (No. 5316-Civil, D. Wyo.); *Penna. Pub. Util. Comm. v. United States* (No. 69-280, M.D.Pa.).

Another district court assumed jurisdiction without discussion. *People of State of California v. United States,* 258 F. Supp. 950 (N.D. Calif. 1966).[13] Mr. Justice Harlan, acting as a Circuit Justice, expressed an initial

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[12] Appeal pending, No. 100, October Term, 1969.

[13] Two unreported decisions have likewise assumed jurisdiction without discussion. See: 251 F. Supp. at 425.

view that judicial review does exist. *Public Service Board of State of Vermont v. United States,* 87 S.Ct. 3, 17 L.Ed.2d 42 (1966).

In *City of Williamsport v. United States,*[14] the district court followed a decision by another district court in *State of Vermont v. Boston & Maine Corp.,* 269 F. Supp. 80 (D.C. Vt. 1967), and upheld the right of judicial review, quoting from the opinion in such case as follows:

> [W]e fail to find convincing evidence that the Congress intended the unusual and concededly unfair result of granting judicial review of the Commission's determination solely to the roads, and not to opposing parties . . . If an order is wrongfully granted, the road can obtain review and reversal. If an order is wrongfully refused, ordinary principles of review of administrative determinations as well as elemental fairness call for review at the instance of opposing parties. Congress having set the standards for the Commission in the Act, its decision to refuse to order discontinuance as well as its decision to order it, should be reviewable . . . *City of Williamsport, supra,* 273 F. Supp. at 902.

Having so ruled the court proceeded to adjudication on the merits. *City of Williamsport v. United States,* 282 F.Supp. 46 (M.D. Pa. 1968). The case was appealed to this Court which affirmed *per curiam* on June 17, 1968, 392 U.S. 642, 20 L.Ed.2d 1348.

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[14] 273 F. Supp. 899 (M.D. Pa. 1967), *adjudicated on the merits,* 282 F. Supp. 46 (1968), *aff'd per curiam* 392 U.S. 642, 20 L.Ed. 2d 1348.

Accordingly, the NARUC asserts that the *Williamsport* decision is dispositive of these appeals and that the district court erred in not following it.

Neither a reading of Section 13a(1) nor its legislative history will support the position of the district court below that Congress intended to deny the public judicial review in train discontinuance cases.[15] To the contrary, the enactment of Section 13a(1) was a remedial effort to put an end to delays experienced in deciding "train-off" cases at the State regulatory level under former practice.[16] Hence, Congress provided alternatively for self-implementation by the railroad in cases where the Commission chose not to investigate a proposed train discontinuance, and for expedited consideration in those

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[15] *Williamsport v. United States*, 273 F. Supp. 899, 902-03 (M.D. Pa. 1967) wherein the court states: "There is nothing [in the legislative history of the Transportation Act of 1958] to suggest that Congress intended to deny judicial review of passenger discontinuances." See also, 2, U.S. Code Cong. and Admin. News, p. 3456 (1958). Noteworthy also are the Hearings Before the Surface Transportation Subcommittee of the Committee on Commerce on S. Res. 284, 89th Cong., 2nd Sess. (1966), concerning "Passenger Train Discontinuances." Such hearings evinced dismay over interpretation of section 13a(1) to, on one hand, grant review to the railroad, but on the other hand, deny it to the public. The hearings also made it clear that *all* section 13a(1) decisions are reviewable pursuant to 28 U.S.C. § 1336(a).

[16] The legislative history reveals that Congressional concern was limited to delays at the state regulatory level. No mention is made of delay occasioned by judicial review afforded by state courts. H.R. Rep. No. 1922, 85th Cong., 2nd Sess., 12 (1958). Such report states in part that: "Because of [local] delay in authorizing, or absolute refusal to authorize, discontinuance . . .it is proposed to add a new section 13a to the act, whereby the railroads, at their option, may have the. . .Commission, rather than the State Commission pass on the discontinuance. . . ."

cases where the Commission instituted an investigation. It does not logically follow that an express Congressional intent to expedite administrative action is synonymous with an intent to deny judicial review of such action.

The district court below has sought to support its holding that judicial review does not lie for train discontinuance decisions under Section 13a(1) by comparing its language with Section 13a(2). The latter Section concerns interstate trains operating wholly within a single State and requires *express* Commission approval for discontinuance of service. The Court reasoned that since the administrative procedures under the two provisions are different the clear availability of judicial review under Section 13a(2) by implication precludes review under Section 13a(1) A.14.

This reasoning by the district court disregards the rationale of *Abbott Laboratories v. Gardner, supra,* 387 U.S. at 141, 18 L.Ed.2d at 687, wherein this Court stated that:

> The Government . . . insists . . . that because the statute includes a specific procedure for such review of certain enumerated kinds of regulations, not encompassing those of the kind involved here, other types were necessarily meant to be excluded from any . . . review. The issue, however, is not so readily resolved; we must go further and inquire whether in the context of the entire legislative scheme the existence of that circumscribed remedy evinces a congressional purpose to bar agency action not within its purview from judicial review. As a leading authority in this field has noted, "The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to

> others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent."[17]

The legislative history of the Administrative Procedure Act, 5 U.S.C. § 1001, *et seq.* (1962), which is entitled to great weight in the Court's consideration of this case, contains the statement that:

> Very rarely do statutes withhold judicial review . . . To preclude judicial review . . . a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review. S. Doc. No. 248, 79th Cong., 2nd Sess., 212 (1946); H.R. Rep. No. 1980, 79th Cong., 2nd Sess., 41 (1946).[18]

And this Court in *Heikkila v. Barber*, 345 U.S. 229, 233, 97 L.Ed. 972, 976 (1963), similarly stated, "[m]ere failure to provide for judicial intervention is not conclusive; neither is the presence of language which appears to bar it.[19] In *Rusk v. Cort*, 369 U.S. 367, 379-80, 7

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[17] The "leading authority" to whom the Court refers is Professor Jaffe, *supra*.

[18] See also, *Air Line Dispatchers Association v. National Mediation Board*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849, 96 L.Ed. 641 (1951), reiterating that the mere fact Congress has not expressly provided for judicial review would be completely immaterial.

[19] In fact, even clear language appearing to limit or foreclose review may be inefficacious. For example, a provision that the action of an administrative body *shall be final* may or may not foreclose review. *Compare, Bridges v. Wixon*, 326 U.S. 135, 89

(Cont'd.)

L.Ed.2d 809, 817 (1962), the Court held that only upon a showing of clear and convincing evidence of a contrary legislative intent should the Court restrict access to judicial review.[20] Accordingly, the Court recently held that Congress will not be presumed to cut off judicial review unless there is a persuasive reason to believe that such was the purpose of Congress. *Abbott Laboratories v. Gardner, supra,* 387 U.S. at 140, 18 L.Ed.2d at 686.

Thus, inasmuch as Congress has not expressly precluded judicial review of Section 13a(1) decisions, entered after hearing and investigation, there is no sound reason for the courts to deny such review.

Sound policy favors judicial review as a guarantee against arbitrary action by the agency. *May Department Stores Co. v. National Labor Relations Board,* 326 U.S. 376, 380, 90 L.Ed. 145, 151 (1945). Noteworthy also, is the following statement by Roscoe Pound:

> [E]xperience shows the need of adequate provision for judicial scrutiny of administrative

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19 (Cont'd.)
L.Ed. 2103 (1945) with *Hallowell v. Commons,* 239 U.S. 506, 60 L.Ed. 409 (1916). The same is true of language providing that administrative action *shall not be reviewed. Compare, Blanchard Machine Co. v. Reconstruction Finance Corp., Price Adjustment Board,* 177 F.2d 727 (D.C. Cir.), *cert. denied,* 339 U.S. 912, 94 L.Ed. 1338 (1949) with *United States v. Babcock,* 250 U.S. 328, 63 L.Ed. 1011 (1919). Moreover, even unequivocal language providing that administrative decisions shall be final and conclusive and *no other official or any court of the United States shall have power or jurisdiction to review* any such decision may be disregarded. *Hospoder v. United States,* 209 F.2d 427 (3rd Cir. 1953); *contra, Siegel v. United States,* 87 F. Supp. 555 (E.D.N.Y. 1949).

20 See, 5 U.S.C. § 701 (1964 Supp. IV) stating that judicial review of final agency action is available except to the extent that statutes preclude review.

> so-called quasi-judicial determinations in order to assure due process of law, to keep administrative agencies not merely within their jurisdiction but also to hold them to the legislative policies in the statutes creating them and those otherwise established by law, and to insure that their determinations have an adequate oasis in evidence of logical probative force.[21] II Pound, Jurisprudence, p. 443 (1959).

Section 1336(a) of Title 28, United States Code (1964), states that:

> [E]xcept as otherwise provided by Act of Congress the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

Obviously, Congress chose broad inclusive terms when it provided for judicial review of "any order"[22] of the Commission.

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[21] Earlier Pound Stated: "[E]xperience shows that it is by no means easy under the pressure of politics to maintain the independent bench which our constitutional polity requires. Yet the judges are given a high degree of independence by constitutional guarantees of their tenure and their salaries and the permanance of the courts in which they sit. There is no such assurance of independent boards and commissions. Any change of administration, any new Congress or legislature may bring reorganization, consolidation with other agencies, abolition, change of personnel, or cutting off of appropriations. Hence, administrative agencies are largely at the mercy of the legislature and under the control of the executive." Pound, Administrative Law, pp. 79-80 (1949).

[22] 5 U.S.C. § 551 (2) 1964, Supp. IV) defines a reviewable order as the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form.

In *United States v. Interstate Commerce Commission*, 337 U.S. 426, 93 L.Ed. 1451 (1949), this Court was concerned with the right of the United States as a shipper to seek judicial review of a Commission reparation order.

Section 9 of the Interstate Commerce Act, 49 U.S.C. § 9, provided that a shipper seeking reparation from a common carrier either had to seek his damages by instituting a law suit or by bringing a complaint before the Commission. The shipper could not pursue both remedies and had to exercise an election. Analogous to the case at bar, there was no express pronouncement concerning judicial review of a Commission decision and it was contended that decisions unfavorable to the carrier were reviewable, but that a similar right was not deemed vested in the shipper pursuant to the "negative order doctrine." In disposing of such contentions, the court stated that:

> [T]he section's careful provision for judicial protection of railroads against improper Commission awards argues against interpretation of the same section to deny to shippers any judicial review whatever. Under the suggested interpretation a shipper could recover nothing if the Commission decided against him. But a Commission award favorable to a shipper is not final or binding upon the railroad. . . . It hardly seems possible to find from the language of § 9 a Congressional intent to guarantee railroads complete judicial review of adverse reparation orders while denying shippers any judicial review at all. *Id.*, 337 U.S. at 435, 93 L.Ed. at 1459-60.

This Court further stated that:

> The contention of the Commission and the railroads . . . [is that] . . . the order is final and not reviewable by any court even though entered arbitrarily, without substantial supporting evidence, and in defiance of law.
>
> Such a sweeping contention for administrative finality is out of harmony with the general legislative pattern of administrative and judicial relationships. (Citations omitted.) *Id.*, 337 U.S. at 433-34, 93 L.Ed. at 1459.

This Court, in interpreting the predecessor of Section 1336(a), stated that:

> [T]he *legal consequences* of this order if upheld will finally relieve the railroad of any *obligation* to the Government on account of the alleged unlawful charges; the order thus falls squarely within the type made subject to judicial review..." (Citations omitted.) (Emphasis added.) *Id.*, 337 U.S. 432-33, 93 L.Ed. 1458.

Similarly, this Court recently held in *Interstate Commerce Commission v. Atlantic Coast Line R. Co.*, 383 U.S. 576, 602, 16 L.Ed.2d 109, 127 (1966), and *Pennsylvania R. Co. v. United States*, 363 U.S. 202, 205, 4 L.Ed.2d 1165, 1168 (1960), that a Commission order is reviewable when *rights* or *obligations* are determined and legal consequences flow therefrom. Certainly this test is met in the instant appeals.

The district court below in denying judicial review of an order terminating an investigation of the Commission, and thereby allowing discontinuance of train service, has resurrected the "negative order" doctrine repudiated by this Court in *Rochester Telephone Corp. v. United*

States, 307 U.S. 125, 83 L.Ed. 1147 (1939). In language that is equally applicable to the instant case, Justice Frankfurter stated for the Court (307 U.S. 142-143, 83 L.Ed. 1159-1160):

> The concept of "negative orders" has not served to clarify the relations between administrative bodies and the courts but has rather tended to obscure them. An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted. An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same.
>
> . . . We conclude, therefore, that any distinction, as such, between "negative" and "affirmative" orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and . . . this distinction . . . can no longer be guiding.[23]

The case of *Stark v. Wickard*, 321 U.S. 288, 88 L.Ed. 733 (1944), involved the regulation of milk prices. The Department of Agriculture had established a pool into which milk handlers made payment for milk and from which milk producers were to receive their payment. The

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[23] The overruling of the negative order doctrine has been confirmed in the Administrative Procedure Act which expressly includes a "negative" order within the definition of an "order" subject to review. See 5 US.C. (Supp. IV) 551, 701(b)(2), 702.

producers sought to enjoin the Secretary of Agriculture from allowing deductions from the pool to cooperatives. The statute involved specifically provided for review in certain instances, but was silent as to review of orders pertinent to deductions from the milk pool. The Court held the orders reviewable and stated, "it is not lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue . . . ". *Id.*, 321 U.S. at 309, 88 L.Ed. at 747. The Court further stated that:

> When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. *Id.*, 321 U.S. at 309-10, 88 L.Ed. at 748.

CONCLUSION

For the foregoing reasons, the judgments of the court below should be reversed and the cases remanded for determination on the merits.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

Nos. 101 and 102

CITY OF CHICAGO, ET AL., APPELLANTS

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

CITY OF CHICAGO, ET AL., APPELLANTS

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLEES.

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Other Sources.

4, Davis, Administrative Law Treatise, p. 80, Sec. 28.16 23
1958 U. S. Code Cong. and Admin. News, pp. 3467-3468 14
104 Cong. Rec..... 14

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

Nos. 101 and 102

CITY OF CHICAGO, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

CITY OF CHICAGO, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLEES.

QUESTION PRESENTED.

Where, after hearing in an investigation of the kind contemplated by Section 13a(1) of the Interstate Commerce Act, the Interstate Commerce Commission concludes not to issue an order requiring the continuance

of operation of a passenger train, in whole or in part, for a period of not to exceed one year, is the Commission's conclusion not to issue such an order subject to judicial review?

STATEMENT.

On August 31, 1967, appellee Chicago & Eastern Illinois Railroad Company (C&EI) gave notice to the Interstate Commerce Commission (Commission), pursuant to Section 13a(1) of the Interstate Commerce Act, that effective October 1, 1967, it would discontinue its passenger trains Nos. 54 and 93, which operated between Chicago, Illinois, and Evansville, Indiana. On September 18, 1967, the Commission, under the provisions of Section 13a(1) of the Interstate Commerce Act, instituted an investigation into such discontinuance, and on January 31, 1968, the Commission, having concluded not to issue an order requiring the continued operation of the trains, discontinued its investigation. The trains were, accordingly, discontinued. Action was thereafter filed by certain of the appellants in the court below seeking to set aside the Commission's conclusion to discontinue its investigation. The action was dismissed on January 8, 1969, for want of jurisdiction in the court below to review the Commission's action. *City of Chicago* v. *United States,* 294 F. Supp. 1103 (N. D. Ill. 1969).

On April 3, 1968, appellee Louisville and Nashville Railroad Company (L&N) gave notice to the Commission, under Section 13a(1) of the Act, that, effective

May 7, 1968, it would discontinue its passenger trains Nos. 6 and 7, which operated between Cincinnati, Ohio, and New Orleans, Louisiana. The Commission on April 24, 1968, instituted an investigation into such discontinuance. The Commission, concluding that it would not issue an order requiring the trains to be continued in operation, discontinued its investigation on September 6, 1968, but, on that day and before L&N discontinued operations of Nos. 6 and 7, some of the appellants herein filed a complaint in the court below in an attempt to set aside the Commission's decision. They also sought, and obtained, a temporary restraining order, without bond, requiring L&N to continue operation of the trains until further order of the court.[1]

On January 8, 1969, the court below dissolved that restraint and dismissed the complaint. *Tennessee Public Service Commission* v. *United States,* 294 F. Supp. 1106 (N. D. Ill. 1969). On the same day, the court below refused to reimpose the restraining order pending hearing of the appeal to this Court. The trains were thereupon discontinued.

On the following day, January 9, 1969, appellants applied to Mr. Justice Marshall for a stay. It was denied by him on January 13, 1969.

This Court on June 16, 1969, noted probable jurisdiction. The C&EI case (No. 101) and the L&N case (No. 102) were consolidated because they involve the same question.

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[1]The effect of the restraining order was to extend beyond the statutory four-month suspension period the date for the discontinuance of trains Nos. 6 and 7. *Cf. Arrow Transp. Co.* v. *Southern R. Co.,* 371 U. S. 658 (1963).

SUMMARY OF ARGUMENT.

The authority for a carrier to discontinue an interstate passenger train comes expressly from the statute and not from any action of the Commission. Under Section 13a(1) the carrier has the right to discontinue the train upon the filing of a 30-day notice, unless the Commission enters upon an investigation. If the Commission enters upon an investigation, discontinuance is postponed for not more than four months and the carrier can, under the statute, discontinue the trains at the end of such four-month period, unless the Commission orders continued operation of all or part of the train for a period not to exceed one year. Such order of continued operation can be made only if the Commission first finds that public convenience and necessity require continued operation and that continued operation will not unduly burden interstate or foreign commerce. Thus, the statute is self-implementing, the authority to discontinue coming from the statute and not any Commission order or action, and the Commission itself has properly so held. *Great Northern Ry. Co. Discontinuance of Service,* 307 I.C.C. 59 (1959).

The intent of Congress in enacting Section 13a(1) in 1958 would be completely frustrated if judicial review of a train discontinuance were allowed. The railroads were in dire financial straits, occasioned in part by the fact that state regulatory bodies (the agencies then having jurisdiction over discontinuance of all passenger trains) were delaying unduly the dis-

continuance of unneeded and costly interstate passenger trains, resulting in heavy drains on the finances of the carriers. In enacting Section 13a(1), Congress placed a five-month maximum period from the date of filing of a notice of discontinuance by the carrier as the maximum time within which the carrier would be required to continue unneeded and costly trains. If judicial review were to be granted, and the *status quo* maintained *pendente lite,* the five-month suspension period would be stretched to a year or more, causing the carrier to continue a train well past the period intended by Congress. *Cf. Arrow Transp. Co.* v. *Southern R. Co.,* 372 U. S. 658 (1963), *supra.*

Assuming *arguendo* that Commission orders are involved in the cases at bar, no right to, or obligation upon, appellants flows from Commission action and, accordingly, they are not entitled to judicial review. *I.C.C.* v. *Atlantic Coast Line R. Co.,* 383 U. S. 576, 602 (1966). This Court has held that protestants to a discontinuance are not entitled to judicial review if the Commission does not investigate such discontinuance. *Bergen County* v. *U. S.,* 359 U. S. 27 (1959). Likewise, appellants are not entitled to review of a discontinuance of an investigation, since no rights accrue to and no obligation is placed upon appellants in such instance. To the extent that state regulatory bodies previously had rights in discontinuances of interstate passenger trains, such rights were extinguished by the enactment of Section 13a(1) and a limited veto power was placed in the Commission, which now represents the public.

As the discontinuance of an investigation does not result in any "order" within the meaning of 28 U.S.C. 1336(a), the appellants are not entitled to judicial review. The authority to discontinue a train after investigation, like authority to discontinue a train where no investigation is held, comes from the statute and not any order of the Commission. Thus, regardless of any label placed on its notice of discontinuance of the investigation by the Commission, no order results which entitles appellants to judicial review. *Cf. United States* v. *Los Angeles R. R.*, 273 U. S. 299, 309 (1927).

Under the provisions of Section 10 of the Administrative Procedure Act (5 U.S.C. 701), no judicial review is available when, as in the cases at bar. agency action is committed to agency discretion. To the limited extent that Congress granted to the Commission power to veto an interstate train discontinuance, such power is committed, unquestionably, to the sole discretion of the Commission. Whether to investigate a discontinuance is at the sole discretion of the Commission, which, the Government says, depends on the existence of a "substantial question." Clearly, then, the provisions of Section 10 of the Adminstrative Procedure Act proscribe judicial review of the cases at bar.

ARGUMENT.

1. The Concept of Judicial Review Is Contrary to the Language of the Statute.

The statute grants to the carrier, upon filing of the prescribed 30-day notice, the right to discontinue the train at the end of the notice period, unless the Commission enters upon an investigation of the proposed discontinuance and serves an order on the carrier at least ten days before the end of the notice period requiring the train or some part thereof to be continued in operation for not more than four months. After hearing conducted in the course of the investigation, the Commission may order the continuance or restoration of operation of the train for a maximum period of one year, only if it finds that the operation of the train "is required by public convenience and necessity *and* will not unduly burden interstate or foreign commerce." (Emphasis added.)

Thus, if the Commission does nothing within the 30-day notice period or decides not to investigate, the discontinuance of the train takes effect automatically (at carrier's option) by operation of the statute at the end of the carrier's 30-day notice period. Likewise, if the Commission does investigate but fails to conclude its investigation within the four-month suspension period, the discontinuance also takes effect by operation of the statute, not by Commission action. The same is true if the Commission terminates the investigation within the four-month period.

The Commission has properly recognized that the statute is self-implementing and that the authority for the railroads to discontinue interstate trains comes not from Commission action but from the statute itself. In *Great Northern Ry. Co. Discontinuance of Service,* 307 I.C.C. 59 (1959), *supra,* the Commission held (pp. 75-76):

> "The authority for such discontinuance flows directly from the statute and not from any action by us. The powers vested in us are strictly limited by the statute. We may order the operation continued, but not more than 4 months, pending an investigation; and upon completion of the investigation we may order continuance or restoration of the operation only if we find affirmatively that the operation of the train or ferry (1) is required by the public convenience and necessity and (2) will not unduly burden interstate commerce.
>
> "We are given no discretion to 'approve' or 'disapprove' a proposed discontinuance under the provisions of section 13a(1). Our duty is, in appropriate cases, to investigate the facts, and only if such investigation warrants the findings specified in the statute may we require a railroad to continue or restore the service which is the subject of the investigation."

Similarly, in *New York, N. H. & H. R. Co. Discontinuance of Trains,* 327 I.C.C. 151, 217 (1966), the Commission, by Vice Chairman Tucker, spoke of "the unique provisions of section 13a(1), a self-implementing statutory provision."

In an effort to support their argument, appellants and the Government, realizing that any order of the Commission issued under Section 13a(2) is subject to judicial review, say that since paragraphs (1) and (2) of Section 13a are alike in their statutory standards, they must be treated alike for purposes of the issue at bar.

Besides the fact that such argument lacks logic, there is a serious question whether the statutory standards are alike, notwithstanding this Court's *dictum* in *Southern R. Co.* v. *North Carolina,* 376 U. S. 93, 103 (1964). Under Section 13a(2), before the Commission may authorize an intrastate train to be *discontinued* it must find: (1) public convenience and necessity *permit* of such discontinuance, and (2) continued operation would constitute an undue burden on interstate operations or commerce. Under 13a(1) the Commission can require *continued* operation of the trains for a period not exceeding one year only if it finds: (1) public convenience and necessity *require* continued operation and (2) continued operation will not constitute an undue burden on interstate or foreign commerce. Thus, putting to one side the other differences obvious from the different language used in the two sections, under 13a(2) *both* statutory findings must be met before a train is discontinued, while under 13a(1) the train may be discontinued by operation of the statute if the Commission makes only one of the two findings or if it makes neither. In any event the statutory-standards issue is not germane to the issue of judicial review.

The clear differences in the way that Congress drafted the two paragraphs of Section 13a is what establishes its intention that cases under Section 13a(1), such as the cases at bar, shall not be reviewable. Section 13a(2) provides that a carrier "may petition the Commission for authority to effect [a] discontinuance" of an intrastate train, if the state authority having jurisdiction has ruled unfavorably or has not ruled within 120 days of the filing of the application by the carrier. If such petition is filed, the Commission must notify the Governor of the State in which the train operates, *must* conduct "a full hearing" in that state, and then the Commission *may grant* such *authority* only upon findings by it that public convenience and necessity permit the discontinuance and that continued operation will constitute an undue burden.

By contrast, under Section 13a(1) the railroad does not apply for any *authority* from the Commission. The carrier discontinues the train at the end of the 30-day notice period (or not later than four months thereafter if the Commission orders the train to be continued while it investigates), unless the Commission, after hearing, orders continued operation for a period not exceeding one year. Clearly, in a 13a(2) case discontinuance stems solely from a Commission order, whereas under Section 13a(1) the discontinuance comes directly from the statute.

A further and exceedingly important distinction between Section 13a(1) and Section 13a(2) lies in the difference in procedures. With respect to an intrastate train, the railroad cannot apply to the Com-

mission unless the state commission has ruled unfavorably to the railroad or has not ruled within 120 days following the filing of the application. Thereafter, a petition to the Commission may be presented by the railroad, and a hearing must be held. Thereafter, briefs to the hearing examiner may be filed. Thereafter, the examiner issues his recommended report and order to which exceptions may be taken. Thereafter, a division report would be issued and, perhaps, thereafter, a petition for reconsideration of the division's report and order could be filed. The procedural steps in a Section 13a(1) case are clearly not analogous to those in a Section 13a(2) case and the substantially greater period entailed in proceedings under 13a(2) make the procedural difference of greater practical importance, particularly where the carrier providing the interstate service is losing substantial sums of money on the operation. Congress' different and more deliberate approach to intrastate discontinuances than to interstate discontinuances is understandable, because as to the former discontinuances Congress was giving the Commission power over operations of a local character.

If appellants and the Government wished to draw an appropriate analogy between Section 13a(2) and another provision of the Interstate Commerce Act, they should have compared it with Section 1(18)-(20) of the Act. Under each provision, the carrier is not entitled to take *any* action unless and until it is first *authorized* by the Commission to do so. The right of the carrier to do the things covered by Section 13a(2) and

Section 1(18)-(20) flows only from affirmative Commission action and appropriate Commission order, not from the statute itself as in the case of Section 13a(1).

The Commission in *Great Northern Ry. Co. Discontinuance of Service,* 307 I.C.C. 59 (1959), *supra,* recognized the great and controlling distinctions between Section 1(18) and Section 13a(1), holding (p. 75):

> "The powers vested in us by section 1(18-20) bear only slight resemblance to those vested in us by section 13a(1). The former section requires as a condition to abandonment that a railroad secure a certificate of public convenience and necessity from this Commission, that the application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as we may from time to time prescribe, that we shall have power to issue such certificate as prayed for, or to refuse to issue it, and that we may attach to the issuance of the certificate such terms and conditions as in our judgment the public convenience and necessity may require."

It is significant that a number of bills providing for judicial review of passenger-train discontinuances under Section 13a(1) have been introduced in Congress since the enactment of that Section. For example, H. R. 18212 and S. 3861, introduced in June of 1968 in the second session of the 90th Congress, each contained the following provision:

> "13a(3) Any State, administrative or regulatory agency of a State, or person, adversely affected or aggrieved by an order of the Commisison en-

tered pursuant to paragraph (1) or (2) of this section, may bring suit to obtain judicial review thereof under those provisions of law applicable in the case of suits to enjoin, suspend, or set aside orders of the Commission."[1]

If existing law provides for judicial review of a Commission discontinuance of an investigation under Section 13a(1), there would be no need whatever to add the above-quoted language to the statute.

Had Congress wanted judicial review of all Section 13a(1) matters, it could have simply tracked the language of Section 13a(2) when it enacted both sections in 1958. It did not do so. It did not so intend.

2. Congress Intended a Prompt and Effective Way to Meet a Critical Problem.

Before the enactment of Section 13a(1) of the Interstate Commerce Act in 1958, the railroads were without adequate remedy in their attempts to discontinue unneeded and costly interstate passenger trains. They were relegated to the piecemeal approach of seeking authority from each of the state regulatory agencies through which the trains operated. This often resulted in endless delays in obtaining the necessary authority from one or more of the state agencies or in the outright denial of the discontinuance proposals. Thus, the railroads were required to continue for extended periods of time the operation of interstate passenger

[1]The inclusion within the scope of the bills of orders under Section 13a(2) must be attributed to a desire for complete uniformity rather than to necessity.

trains which the traveling public had virtually deserted and which, according to estimates of the Commission, resulted in a $700 million annual deficit for the railroads of the country. [H. Rep. No. 1922, 85th Cong. 2nd Sess. (1958), 1958 U. S. Code Cong. and Admin. News, pp. 3467-3468].

When Section 13a(1) was enacted the railroads were in an "exceedingly perilous financial condition," unable to continue to absorb the devastating losses from passenger operations (104 Cong. Rec., p. 12543). Some railroads were on the brink of bankruptcy (104 Cong. Rec., p. 12527), and Congress recognized that something must be done quickly in the legislative area if railroads were to continue as a needed transportation agency (104 Cong. Rec., pp. 12539-12540).

These, then, were the circumstances leading up to the enactment of Section 13a(1). The worsening railroad condition called for immediate corrective legislation which would prevent the state agencies from unduly delaying the discontinuance of little-used and costly passenger trains.

Appellants and the Government suggest that Congress was concerned only with delays in proceedings in the states, not with delays before the Commission and the federal courts, when it enacted Section 13a(1) (appellants' brief, pp. 10-11; Government's brief, p. 19). Such an argument is baseless. Congress was concerned with delays encountered by the railroads in ridding themselves of unneeded trains, and it would be ridiculous to suggest that Congress merely changed the forum for such delays by enacting Section 13a(1).

The Government also says that the policy of avoidance of delays can be "sufficiently implemented" in review proceedings before the district court (Government brief, p. 19). Such contention does not square with reality. If a right to judicial review is recognized, a district court is likely to be persuaded by an argument in favor of maintaining the *status quo* until the matter can be heard on the merits. There then follow: the filing and disposition of the opponents' petition for reconsideration before the Commission; completion of the pleadings in court; action on preliminary motions; filing of extensive briefs on the merits; and, finally, hearing and decision by the three-judge court. In No. 102, more than nine months passed between the L&N's notice of intention to discontinue train service and the actual discontinuance of the train upon the dissolution of the district court's temporary restraining order. Indeed, if appellants' application to this Court for a stay had been granted the trains would still be operating and losing about $1 million annually (Appendix, p. 57), and the L&N would be without protection of any bond.

This is no isolated instance. For example, see also *City of Williamsport* v. *United States,* 273 F. Supp. 899 (M. D. Pa. 1967), 282 F. Supp. 46 (M. D. Pa. 1968). The facts of that case show that notice of discontinuance was filed in January, 1967, a temporary restraining order was issued in May, 1967, and the complaint was dismissed on the merits in March, 1968. There is no indication in the opinion that the restraining order was dissolved prior to March, 1968. Like-

wise, in *City of Chicago* v. *United States,* 300 F. Supp. 115 (N. D. Ill. 1969), the notice of discontinuance was filed on June 14, 1968, a temporary restraining order was issued on November 15, 1968, and on June 2, 1969, the Commission's decision was affirmed and the restraining order was dissolved.

Clearly, the legislative intent to eliminate delays is not "sufficiently implemented" if appellants' and the Government's contentions for judicial review are accepted. By the enactment of Section 13a(1), Congress provided for the elimination of interstate trains no later than five months after notice is filed, unless continued operation is required by public convenience *and* does not constitute an undue burden.[1] If Congress had intended a longer period than five months, it would have followed the language of Section 13a(2). *Cf. Arrow Transp. Co.* v. *Southern R. Co.,* 372 U. S. 658, 664 (1963), *supra,* wherein this Court, in discussing the Commission's seven-month suspension power under Section 15(7), held:

> "It cannot be said that the legislative history of the grant of the suspension power to the Commission includes unambiguous evidence of a design to extinguish whatever judicial power may have existed prior to 1910 to suspend proposed rates. However, we cannot suppose that Congress, by vesting the new suspension power in the Commis-

[1] If no undue burden exists as to a proposed discontinuance, then the continued operation would, of course, have no materially adverse effect on the financial condition of the carrier, the issue with which Congress dealt when it enacted Section 13a(1).

> sion, intended to give backhanded approval to the exercise of a judicial power which had brought the whole problem to a head."

Appellants and the Government would transform a statute which expressly permits only a five-month delay in a discontinuance into a procedure which sanctions delays of one to one and one-half years, or more, even though the Commission has determined and the three-judge court ultimately determines that the discontinuance is proper. Such a transformation can only be described as a frustration of the overriding purpose of Congress in enacting Section 13a(1).

3. Appellants Are Not Entitled to Review Because Section 13a(1) Does Not Grant a Right to Them or Impose Any Obligation Upon Them.

As this Court stated in *I.C.C.* v. *Atlantic Coast Line R. Co.,* 383 U. S. 576, 602 (1966), *supra:*

> "Recent decisions of this Court have recognized that Commission orders determining a 'right or obligation' so that 'legal consequences' will flow therefrom are judicially reviewable."

And so, even assuming *arguendo* that Commission orders are involved in the cases at bar, inquiry must be made to determine whether any right or obligation of appellants flows from agency action.

Clearly, there is none. The discontinuance of the investigations by the Commission simply enabled the railroads to exercise the authority granted by statute.

The discontinuances did not compel appellants to do anything nor did such "orders" create any right in appellants. This was recognized by the district court in *State of New Jersey* v. *United States,* 168 F. Supp. 324 (N. J. 1958), *aff'd. sub. nom., Bergen County* v. *U. S.,* 359 U. S. 27 (1959), where, in discussing the interests of state and local authorities, the court held (p. 334):

> "The discontinuance of service by a carrier pursuant to the direct Congressional authorization embodied in Section 13a(1) poses no threat to life, liberty or property."

It further held, discussing the enactment of Section 13a(1) (p. 336):

> "Such congressional action not only extinguishes such [Board of Public Utility Commissioners]—created rights, but also any other public rights which may have resulted from the initial grants of ferry franchises . . ."
>
> * * *
>
> "When Congress enacted Section 13a(1) the rights of the plaintiff-intervenors as well as those of the original plaintiffs became conditional licenses subject to termination through the invocation by the carrier of the procedure prescribed therein."

Appellants and the Government contend that the concept of "fairness" should entitle appellants to review, since a railroad is entitled to review in the event

the Commission orders it to continue operation for a period not exceeding one year.

Such contention was disposed of in the *Bergen County* case, *supra.* That case involved the discontinuance of passenger ferries by railroad under the provisions of Section 13a(1). Appropriate notice of discontinuance was filed by the carrier, and protests were lodged with the Commission by the State of New Jersey and its regulatory body. The Commission, in the exercise of its discretion, elected not to investigate and issued a written notice to the parties to that effect. The ferries were discontinued in accordance with the carrier's 30-day notice. A complaint was filed by New Jersey and others seeking to set aside the Commission's notice and to require the Commission to investigate the discontinuance. The lower court dismissed the complaint in *State of New Jersey* v. *United States, supra,* on the grounds that Section 13a(1) did not permit judicial review. That decision was affirmed *per curiam* in the *Bergen County* case, *supra.*

Thus, the states and communities do not have a right to judicial review under Section 13a(1) where the Commission refuses to investigate the discontinuance. Obviously, the alleged interest of states and communities is as great in the circumstances where the Commission does not investigate as where it does. Accordingly, there is no basis to contend that appellants are entitled to judicial review in the interest of "fairness." Congress has decided, as it has the right to decide, that there shall be judicial review under Section 13a(1) only when the Commission, by

order, interferes with the carrier's right to discontinue which flows directly from the statute.

This Court has, of course, recognized that Congress can determine, absent a constitutional issue, the extent of judicial review, if any. *Labor Board* v. *Cheney Lumber Co.,* 327 U. S. 385, 388 (1946). And although Congress did not have to be "fair" in enacting Section 13a(1) [*State of New Hampshire* v. *Boston and Maine Corporation,* 251 F. Supp. 421, 425 (New Hamp. 1965)], we submit that the interests of all segments of the public are fairly protected under the statutory scheme of Section 13a(1) without procedure for judicial review. The Commission represents the public, *United States* v. *Merchants &c. Ass'n.,* 242 U. S. 178 (1916). Under the provisions of Section 13a(1), it replaces state regulatory bodies as the representative of the public. In determining whether to exercise its limited veto power over interstate train discontinuances, the Commission, however, entertains and fully considers the protests of public bodies, as it did in these cases, in arriving at its ultimate conclusion. It cannot, therefore, be said that the public expressions have not been amply considered when the Commission, acting for the public, discontinues a Section 13a(1) investigation.

4. Discontinuance of the Investigation by the Commission Is Not an Order Within the Meaning of 28 U.S.C. 1336(a).

As we have before shown, the carrier may discontinue operation of the trains, whether or not an investigation is conducted, at the end of the periods described in Section 13a(1), such authority coming directly from the statute and not from any Commission action. Indeed, the statute makes no reference whatever to the issuance by the Commission of any "order" when it does not investigate or when it terminates an investigation. Thus, in the cases at bar, the Commission's utterances, labeled "orders" discontinuing the investigations, are gratuitous and may be characterized as simply "housekeeping" orders.

Had the Commission after the investigation, however, directed the carrier to continue operations for one year, it could only do so by an "order" as the statute expressly provides, because by such an order the Commission would be requiring the carrier to do something contrary to what the statute otherwise grants to the carrier.

Accordingly, it is obvious that the "orders" in the cases at bar are not orders within the meaning of 28 U.S.C. 1336(a). *Cf. United States* v. *Los Angeles R. R.*, 273 U. S. 299, 309 (1927), *supra,* where this Court held:

> "The final report on value, like the tentative report is called an order. But there are many

orders of the Commission which are not judicially reviewable under the provision now incorporated in the Urgent Deficiencies Act."

Appellants and the Government contend that the court below resurrected the "affirmative" versus "negative" order doctrine rejected by this Court in *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125 (1939). Such contention is without merit. In the *Rochester Telephone* case, this Court explained that the "affirmative" and "negative" order doctrine (the former-type order, but not the latter, being subject to judicial review) was based on the issue of whether or not the Commission's order had the legal effect of changing the *status quo* (pp. 140-141, footnote 24). If the Commission's discontinuance of investigations in the cases at bar were properly to be characterized under that discarded doctrine as "orders" they would be "affirmative", not "negative", because the *status quo* would have changed; that is, the trains which formerly operated were not operating after issuance of the Commission's "orders." But *post hoc, ergo propter hoc* is fallacious reasoning. The trains were not discontinued by authority of the Commission's orders. They were discontinued by force of the authority which flowed directly from the statute once the Commission had concluded not to exercise its veto power.

The Government also contends that once the Commission undertakes an investigation it is required by Section 14(1) to make appropriate findings and to issue an order. In response to that contention, it is sufficient to say that the requirements, if any, under

Section 14(1) in no way support the proposition that a Section 13a(1) discontinuance is judicially reviewable. In other words, reviewability exists or does not exist depending upon the statutory scheme of Section 13a(1), not Section 14(1). *Cf. United States* v. *Los Angeles R.R., supra,* where this Court held that a so-called valuation "order" of the Commission was not subject to judicial review notwithstanding that an extensive investigation was conducted by the Commission.

5. Section 10 of the Administrative Procedure Act Bars Judicial Review.

Section 10 of the Administrative Procedure Act [5 U.S.C. 701] deals with judicial review of agency action, and its introductory clause establishes that the cases at bar are not subject to judicial review. In pertinent part, Section 10 provides:

> "(a) This chapter applies, according to the provisions thereof, except to the extent that . . . (2) agency action is committed to agency discretion by law."

Accordingly, as Professor Davis has stated in *Administrative Law Treatise,* Vol. 4, Section 28.16, p. 80:

> "All of section 10 of the Administrative Procedure Act, dealing with judicial review, is modified by the two parts of the introductory clause, one part of which is: 'Except so far as . . . agency action is by law committed to agency discretion— . . .' Whatever the scope of review prescribed by subsection (e) when read alone, the

> scope of review is narrowed by the introductory clause to the extent that the action is by law committed to agency discretion. For instance, although subsection (e) provides that the reviewing court shall set aside agency action found to be 'arbitrary [or] capricious,' the reviewing court may not set aside arbitrary or capricious action so far as agency action is by law committed to agency discretion. All other clauses of subsection (e) and of the rest of section 10 are similarly modified by the introductory clause."

To the limited extent that Congress granted the Commission power to act to veto interstate passenger train discontinuances, such power is, unquestionably, committed to the sole discretion of the Commission. This is graphically established in the Government's brief (pp. 20-21). First, the Government correctly admits that there is no judicial review if the Commission does not investigate. But, says the Government, if a "substantial question" exists, the Commission investigates and the results of the investigation are subject to judicial review (a conclusion with which we disagree). Thus, the threshold question is what is a "substantial question" and who decides whether one exists? Obviously, it is not the carrier or the opponents to the discontinuance, but the Commission, and it alone, that makes the decision in the exercise of its absolute discretion.[1]

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[1]Interestingly, an analysis of the argument of the Government reveals that it is, in effect, contending that the *Commission* decides whether judicial review is available. That is to say, if the

(Footnote continued on following page)

It is difficult to imagine any matter committed more fully to agency discretion than is the function of the Commission under Section 13a(1). The limited discretionary power vested in the Commission by Section 13a(1) is clearly the type of action "committed to agency discretion by law" contemplated by Section 10(a) of the Administrative Procedure Act, and the exercise by the Commission of its discretion is not subject to judicial review.

Commission decides that no "substantial question" exists, there is no judicial review; but if the Commission decides a "substantial question" does exist, then appellants are entitled to judicial review. Obviously, the Commission has no such power.

CONCLUSION.

For the reasons stated, the judgments of the court below should be affirmed.

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Due Date: September 19, 1969.

SUPREME COURT OF THE UNITED STATES

Nos. 101 AND 102.—OCTOBER TERM, 1969

City of Chicago, et al., Appellants, 101 *v.* United States et al., City of Chicago, et al., Appellants, 102 *v.* United States et al.,	On Appeals From the United States District Court for the Northern District of Illinois.

[December 9, 1969]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question in these cases is whether orders of the Interstate Commerce Commission discontinuing investigations respecting the notice of rail carriers to terminate or change the operation or services of interstate passenger trains are judicially reviewable on the complaint of aggrieved persons.

Section 13a (1) of the Interstate Commerce Act, 72 Stat. 571, 49 U. S. C. § 13a (1) provides, with details not important here, that a rail carrier may file notice of such discontinuance or change with the Commission and that within 30 days the Commission may make an investigation of the proposed discontinuance or change. Apart from interim relief, the Commission may order continuance of the operation and service for a period not to exceed one year.[1] One of the present cases involves two inter-

[1] Section 13a (2), applicable to discontinuance of intrastate trains, provides that where a State bars discontinuance or change in operation or service of a train, or where the state authority has not acted on a carrier's application for such discontinuance change within 120 days, the carrier may petition the Commission for a grant of such authority.

state passenger trains between Chicago and Evansville, Indiana, discontinued by the Chicago & Eastern Illinois R. Co. (331 ICC 447) and the other two interstate passenger trains between New Orleans and Cincinnati discontinued by the Louisville & Nashville R. Co., 333 ICC 720.

In each case the Commission, addressing itself to the standards in § 13a (1), found that continued operation of the trains was not required by public convenience and necessity and that continued operation would unduly burden interstate commerce. It thereupon entered in each case an order terminating its investigation of the proposed discontinuance.

Appellants in each case—cities, state regulatory agencies, and other interested parties—brought these suits before the same three-judge court to review the Commission's decisions. It is provided by 28 U. S. C. § 1336 (a):

> "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

The District Court held that decisions terminating investigations under § 13a (1) are not "orders" within the meaning of 28 U. S. C. § 1336 (a).[2] 294 F. Supp. 1103, 1106. The cases are here on direct appeal, 28 U. S. C. §§ 1253, 2325, and we noted probable jurisdiction. 395 U. S. 957.

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[2] There is a conflict among the District Courts. *Minnesota* v. *United States*, 238 F. Supp. 107, and *New Hampshire* v. *Boston & Maine Corp.*, 251 F. Supp. 421, are in accord with the District Court in the instant cases. Opposed to that view are *Vermont* v. *Boston & Maine Corp.*, 269 F. Supp. 80, and *New York* v. *United States*, 299 F. Supp. 989. And see *City of Williamsport* v. *United States*, 273 F. Supp. 899, 282 F. Supp. 46, aff'd 392 U. S. 642.

As stated in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140, we start with the presumption that aggrieved persons may obtain review of administrative decisions unless there is "persuasive reason to believe" that Congress had no such purpose. Certainly under § 13a (1) the carrier if overruled by the Commission, could obtain review. We can find no talismanic sign indicating that Congress desired to deny review to opponents of interstate discontinuances alone.

Section 13a in its present form came into the Act in 1958 and was designed to supersede the prior confused and delayed procedure under which the States supervised the discontinuance of passenger trains. Accordingly, Congress provided a uniform federal scheme to take the place of the former procedure.[3] A *single federal standard* was to govern train discontinuances whether interstate or intrastate, though *the procedure* of § 13a (1) for

[3] "Without reciting individual cases the subcommittee is satisfied that State regulatory bodies all too often have been excessively conservative and unduly repressive in requiring the maintenance of uneconomic and unnecessary services and facilities. Even when allowing the discontinuance or change of a service or facility, these groups have frequently delayed decisions beyond a reasonable time limit. In many such cases, State regulatory commissions have shown a definite lack of appreciation for the serious impact on a railroad's financial condition resulting from prolonged loss-producing operations.

"To improve this situation, the subcommittee proposes to give the Interstate Commerce Commission jurisdiction in the field of discontinuance or change of rail services and facilities similar to the jurisdiction it now has over intrastate rates under section 13 of the Interstate Commerce Act so that when called upon to do so it may deal with such matters that impose an undue burden on interstate commerce. This, the subcommittee believes, would protect and further the broad public interest in a sound transportation system and would prevent undue importance being attached to matters of a local nature." S. Rep. No. 1647, 85th Cong., 2d Sess., p. 22. For a review of the legislative history of § 13a (2) see *Southern R. Co.* v. *North Carolina*, 376 U. S. 93, 100–103.

discontinuance of an interstate train was made somewhat different from the procedure for discontinuance of intrastate trains.[4] But the Commission is to have the final say in each case and "precisely the same substantive standard" now governs discontinuance of either interstate or intrastate operations. *Southern R. Co.* v. *North Carolina*, 376 U. S. 93, 103.

Whether the Commission should make an investigation of a §13a (1) discontinuance is of course within its discretion, a matter which is not reviewable. *State of New Jersey* v. *United States*, 168 F. Supp. 324, affirmed, 359 U. S. 27. But when the Commission undertakes to investigate, it is under a statutory mandate:

> "Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises . . . ." 49 U. S. C. § 14 (1).

A decision to investigate indicates that a substantial question exists under the statutory standards. The Commission's report therefore deals with the merits. We cannot say that an answer that discontinuance should not be allowed is agency "action," while an answer saying the reverse is agency "inaction." The technical form of the order is irrelevant. In each case the Commission is deciding the merits. The present cases are kin to the "negative orders" [5] which we dealt with in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 142–143:

> "An order of the Commission dismissing a complaint on the merits and maintaining the *status quo*

[4] See n. 1, *supra*.

[5] The Administrative Procedure Act, 5 U. S. C. (Supp. IV) § 551 (6) defines "order" as including a "negative" form of "a final disposition" by agency action. And that kind of "order" is subject

is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. . . .

"We conclude, therefore, that any distinction, as such, between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding."

The District Court reasoned that since "the statute is self-implementing," only an "order" requiring action is reviewable. 294 F. Supp., at 1106. But that theory is of the vintage we discarded in *Rochester Telephone.*

Reversed.

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to judicial review. 5 U. S. C. (Supp. III) §§ 551 (13), 701 (b)(2), 702.

When carriers file new rates, the Commission has authority on its own initiative or on complaint to make an investigation either with or without suspension of the new rates. 49 U. S. C. § 15 (7). Where the Commission finds the proposed rates lawful, its order reads "the investigation proceedings [are] discontinued." See *Eastern Central Motor Carriers Ass'n* v. *Baltimore & O. R. Co.,* 314 ICC 5, 51. Such orders are reviewable. *Cooper-Jarrett Inc.* v. *United States,* 226 F. Supp. 318; affirmed, 379 U. S. 6.